Petition

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No. 81-360

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Petitioners,

v.

JOHN O. MARSH, JR., Secretary, Department of the Army, *et al.*,

Respondents.

THE IZAAK WALTON LEAGUE OF AMERICA, *et al.*,

Petitioners,

v.

JOHN O. MARSH, JR., Secretary, Department of the Army, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

For The Izaak Walton League of America, et al.

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

For The Atchison, Topeka and Santa Fe Railway Company, et al.

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

JOSEPH D. FEENEY
Western Railroad Association
222 South Riverside Plaza
Chicago, Illinois 60606
(312) 648-7812

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QUESTIONS PRESENTED

1. Whether the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, requires trial and determination of disputed issues of fact underlying federal agency adjudications?

2. Where there are disputed issues of fact underlying agency adjudication, is the agency required to disclose the data and arithmetic calculations underlying its factual claims?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs in the district court, and appellants in No. 79-2530 and appellee in No. 80-1017 in the court of appeals, were: The Atchison, Topeka and Santa Fe Railway Company; Burlington Northern, Inc.; The Chicago and North Western Transportation Company; Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company; The Denver and Rio Grande Western Railroad Company; Illinois Central Gulf Railroad Company; The Kansas City Southern Railway Company; Missouri Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Norfolk and Western Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Soo Line Railroad Company; Southern Pacific Transportation Company; Toledo, Peoria & Western Railroad Company; Union Pacific Railroad Company. Since the appeal below was filed, the St. Louis-San Francisco Railway Company merged into Burlington Northern, Inc., and the Chicago, Rock Island and Pacific Railroad Company is no longer an operating railroad. Additionally, Richard B. Ogilvie has replaced Stanley E. G. Hillman as Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Plaintiffs in the district court, and appellants in No. 79-2529 and appellee in No. 80-1024 in the court of appeals were: The Izaak Walton League of America; The Sierra Club; and The Izaak Walton League of America, Illinois Division.

Defendants in the district court, and appellees in Nos. 79-2530 and 79-2529 in the court of appeals were: John O. Marsh, Jr., Secretary of the Army; The United States Army Corps of Engineers; and Major General John Morris, Chief of Engineers, Department of the Army.

Intervenor-Defendant in the district court, and appellee in Nos. 79-2529 and 79-2530 and appellant in Nos. 80-1017 and 80-1024 in the court of appeals was: Association for the Improvement of the Mississippi River.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled cause.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, which is not yet officially reported,

was rendered on April 24, 1981. The slip opinion issued by the court of appeals is reprinted in Appendix C of the separately-bound Appendix to this petition.

The United States District Court for the District of Columbia issued five (5) officially-reported opinions, all of which are reprinted in the Appendix: *Atchison, Topeka & Santa Fe R. Co.* v. *Alexander (Atchison V)*, 480 F. Supp. 980 (D.D.C. 1979) (Appendix E); *Atchison, Topeka & Santa Fe R. Co.* v. *Alexander (Atchison IV)*, 480 F. Supp. 972 (D.D.C. 1979) (Appendix G); *Atchison, Topeka & Santa Fe R. Co.* v. *Callaway (Atchison III)*, 459 F. Supp. 188 (D.D.C. 1978) (Appendix H); *Atchison, Topeka & Santa Fe R. Co.* v. *Callaway (Atchison II)*, 431 F. Supp. 722 (D.D.C. 1977) (Appendix I); *Atchison, Topeka & Santa Fe R. Co.* v. *Callaway (Atchison I)*, 382 F. Supp. 610 (D.D.C. 1974) (Appendix J).

Only the most recent of the district court opinions, *Atchison V*, is pertinent to this Petition.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1981. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on May 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, are set out verbatim in Appendix M.

STATEMENT OF THE CASE

This case focuses on the mandatory statutory framework created by the Administrative Procedure Act (APA)[1] for the trial and resolution of disputed issues of fact underlying federal agency action. Put in practical terms, what does a lawyer do whose client faces the loss of millions of dollars as a result of a federal agency decision where there are seriously disputed issues of fact underlying that decision?

Whether the agency action is classified as "rulemaking" or "adjudication" under § 551 of the Act, the APA provides clear statutory directives for trial and determination of disputed issues of fact which form the purported factual basis for the agency action. Unfortunately, the lower federal courts have become increasingly confused regarding the APA statutory mandate for trying and determining disputed issues of fact. Despite the clear statutory APA framework which defines the respective roles of the agency and district court in trying and determining disputed fact issues, the courts have created analytical chaos.

Instead of following the clear mandate of the APA, the lower courts are increasingly fashioning bizarre and logically inconsistent non-statutory or "common-law" procedures for determination of disputed fact issues—procedures which ignore and violate both the letter and spirit of the Administrative Procedure Act. The situation has deteriorated to the point where citizens—be they large corporations, environmental groups or individuals—have no certainty as to the APA statutory procedures governing trial and resolution of disputed issues of fact.

This case vividly illustrates the confusion being sown by the lower courts' distortion of the statutory APA procedures for trying and resolving disputed issues of fact. The case arises

[1] 5 U.S.C. §§ 551 *et seq.*

from a Corps of Engineers post-authorization decision to expand barge freight traffic on the Mississippi River by building a new dam and new larger navigation lock at Alton, Illinois—Lock and Dam 26.

Once Congress has authorized a navigation project, the Corps of Engineers decides whether to build it. The Corps decision to build an authorized project is called a "reaffirmation" and the substantive standard or rule governing the Corps decision to "reaffirm"—and against which the facts of any specific authorized project must be measured—is whether the authorized project is "feasible".[2] The Corps of Engineers defines "feasible" as a project which has economic benefits in excess of the economic costs.[3] If the authorized project has economic benefits greater than costs the Corps then balances the net economic benefits against the environmental impact caused by the project.[4] If, however, the authorized project has

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[2] "The recommended plan of improvement shall be feasible based on applicable economic, engineering, environmental, and social evaluation criteria." 33 C.F.R. § 257.5(d).

[3] "Q. . . . I take it a project is economically *feasible* if its national *economic* development *benefits are greater than* its national economic development costs?

A. Yes.

Q. All right. And it is economically *infeasible* if its national *economic* development *benefits* are *less than* its national *economic* development *costs*?

A. Yes."

Deposition Testimony by Edward Cohn, a Corps official designated by the Corps pursuant to Rule 30(b)(6) F.R.C.P. as having knowledge of Corps decisionmaking standards. Cohn Dep., July 18, 1979, pp. 137-138 (emphasis added)

[4] "Q. So the balancing of environmental costs and benefits and economic costs and benefits is done in the *post-authorization stage* now by the Division Engineer, if it is a *reaffirmation*, is that right?

A. Yes, that is part of the *decision*. The balancing of the public interest, the environment, the economics and any other factors which are taken into account is done by the *decision-maker*.

(Footnote continued on following page)

economic benefits *less than* economic costs and the authorized project is therefore not feasible, the Corps does not build the project.[5]

The Corps made several factual claims which it said demonstrated that the authorized Lock and Dam 26 project was "feasible" and therefore qualified for "reaffirmation" and construction.[6] In support of its claim that the Lock and Dam 26 project had economic benefits in excess of economic costs the Corps made the factual claim that the economic benefits were $86,995,000 annually and that economic costs were $44,867,000 annually (Appendix C, p. C 68 n.85). The Corps then claimed that the net economic benefits ($86,995,000—$44,867,000) outweighed the environmental impact of the

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(Footnote continued from preceding page)

Q. And the *decision-maker* in the *post-authorization situation* in a *reaffirmation* is the *Division Engineer*?

A. Yes, that's right."

Cohn Dep., July 18, 1979, pp. 194-195 (emphasis added)

[5] "Q. And what happens if it came up to OCE and the District post-authorization report says the benefits are less than the costs?

A. We would have to consider putting it in the deferred or inactive categories *and shelving it.*

Q. *By shelving it, you mean not constructing it, isn't that right?*

A. *Of course."*

Cohn Dep., July 18, 1979, pp. 68-69 (emphasis added)

[6] This lawsuit *does not* challenge the legality or propriety of *Congress'* decision to authorize this project or any of the hundreds of other public works projects. Nor does this lawsuit challenge the adequacy of an environmental impact statement or any other documents purporting to contain the factual support for Congress' decision to authorize this project or any other project. Congress authorizes literally hundreds of major public works projects, many of which are not constructed because the Corps—not Congress—makes the decision to build or not to build. This lawsuit *does* challenge the Corps' post-authorization decision to build—a decision which requires a "reaffirmation" by the Corps.

expanded traffic which the Corps characterized as "minor". The Corps also made factual claims as to the cost and feasibility of alternative maintenance procedures on the existing structure.

Many of the Corps' factual claims are disputed by petitioner railroads who will suffer severe and certain economic injury as a result of the Corps' action[7] and by the petitioner environmental organizations who are concerned about damage to the upstream wildlife refuges from expanded barge traffic.[8] Virtually all of the Corps' key factual claims involved commonplace existing facts drawn from actual events and were far less complex than factual issues tried and determined by thousands of judges and juries daily.

The fundamental issue in this case is the procedure mandated by the Administrative Procedure Act for trial and determination of disputed factual issues. To properly appre-

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[7] One of the factual issues is how much the railroads' loss will be. This issue depends on a factual dispute between the Corps and the railroads as to the *current actual* cost components of the railroads' gross revenue, i.e. the percentage of current rail revenue on the subject rates which constitutes the "variable" or "avoidable" cost of moving the traffic vs. the excess of revenue over variable cost—called "contribution"—which contributes to the fixed costs of maintaining service for all shippers. By the Corps' own admission and contrary to the statement of the court of appeals (Appendix C, pp. C 66-67) this contribution is *not* a transfer payment (*See* testimony of Robert Daniel, a Corps economist, July 19, 1979, TR 169) and represents a loss to the railroads of $10 million or $45-50 million annually depending on the determination of disputed factual claims by the Corps and the railroads as to the relative percentages of variable cost and contribution in the current actual rail rate structure for the subject traffic.

[8] The factual basis of the Corps claim that the environmental impact of the barge traffic impact will be "minor" is the Corps' apportionment of the traffic on various upstream reaches of the Mississippi and Illinois Rivers. This apportionment is purportedly based on a simple step by step arithmetic calculation predicated on current actual shipper cost differences between barge and rail for current actual movements.

ciate the confusion of the courts below it is necessary to set forth the simple framework mandated by the APA.

While the Corps decision to build Lock and Dam 26 is properly categorized as "adjudication" under 5 U.S.C. § 551,[9] the distinction makes little practical difference. Whether the agency decision is classified as rulemaking or adjudication the APA framework provides only two mechanisms for trying and determining disputed issues of fact:

1. If a statute—other than the APA—requires that the agency decision be made "on the record after opportunity for agency hearing", then the APA requires that a trial and determination of disputed fact issues be made by the agency subject to the judicially patterned procedural protections of § 556 and § 557.[10] In such proceedings the proponent of the order (adjudication) or rule—typically the agency—has the burden of proof. 5 U.S.C. § 556(d). Judicial review of the agency's factual findings on all disputed issues of fact is made by the "substantial evidence" test. 5 U.S.C. § 706(2)(E). This statutory format essentially places the agency—subject to the judicially patterned procedural protections of § 556-557—in the role of a trial court on disputed fact issues. A federal court reviewing these findings of fact under the "substantial evidence" test serves an appellate function not unlike a court reviewing a jury's findings of fact.

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[9] Under the APA, all final agency actions are either "rulemaking," 5 U.S.C. § 551(5) or "adjudication," 5 U.S.C. § 551(7). Adjudications are, by definition, all final agency actions which are not rulemaking. 5 U.S.C. § 551(6) and (7). Since the Corps decision to build a dam and lock can hardly be called a "rule," 5 U.S.C. § 551(4), the Corps decision is by definition an "adjudication". The court of appeals agreed that the Corps post-authorization "reaffirmation" decision to build was an "adjudication". Appendix C, p. C 30.

[10] This requirement applies equally to "rulemaking," § 553(c), and "adjudication," § 554(c).

2. Where, however, there is no separate statute requiring the agency to decide based "on the record after opportunity for agency hearing", the APA provides an equally effective mechanism for trial and determination of disputed issues of fact. Under such circumstances, disputed issues of fact underlying the agency's rulemaking or adjudication decisions are to be tried and determined by the district court. This simple proposition was self-evident to the legislative draftsmen of the Administrative Procedure Act and is repeatedly expressed throughout the legislative history of the APA. See, *Legislative History of the Administrative Procedure Act*, S. Doc. No. 248, 79th Cong., 2d Sess. (1946) (hereinafter "*Legis. Hist.*"):

Comment by Senate Judiciary Committee on § 554:

> There should be no disposition to compel administrative hearings where Congress has not already so provided because, as pointed out below in connection with judicial review, the established law permits a trial *de novo*, of the facts in all cases of adjudications where statutes do not require an administrative hearing. Moreover, as to subjects triable *de novo* in the courts, although the administrative procedure may in some instances shift the burden of proof the parties have a right to ultimate full judicial process.
>
> *Legis. Hist.*, at p. 22

Comment by Senate Judiciary Committee § 706(2)(E) and (F):

> The fifth category [§ 706(2)(E)] necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administrative record may be made. The sixth category [§ 706(2)(F)] expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review (see *Kessler* v. *Strecker*, 307 U. S. 22, 35 (1939)). It should be noted that the sixth category, in accordance with the established

rule, would permit trial *de novo* to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing.

Legis. Hist., at pp. 38-39

Comment by Senate Judiciary Committee on § 706:

The sixth category, respecting the establishment of facts upon trial *de novo*, would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8 [§§ 556 & 557]. It would also require the judicial determination of facts in connection with rule making or any other conceivable form of agency action to the extent that the facts were relevant to any pertinent issues of law presented.

Legis. Hist., at p. 214

Comment of Rep. Walter—one of the APA architects—on § 554:

The requirements of section 5 are thus limited to cases in which statutes otherwise require a hearing because, where statutes do not require an agency hearing, the parties affected are entitled to try out the pertinent facts in court.

Legis. Hist., at p. 359

Thus, the framework of the APA is crystal clear as to the trial and determination of disputed fact issues. Disputed issues of fact are either tried and determined by the agency pursuant to judicially patterned procedures of §§ 556-557—with the agency serving essentially as a trial court and the district court serving as an appellate court—or the disputed issues of fact are tried and determined by the district court.

Applying these principles to the disputed factual issues underlying the Corps factual claims is simple. There is no statute which requires Corps decisions to be made "on the

record after opportunity for agency hearing".[11] The Corps never gave petitioners an opportunity for a trial and determination of the disputed fact issues. Consequently, the statutory framework of the APA described above mandated that petitioners be given an opportunity for trial and determination of disputed fact issues in the district court.[12]

Unfortunately, both the district court and the court of appeals ignored the clear mandate of the APA. Instead, the courts followed what can only be characterized as a bizarre and logically inconsistent non-statutory procedure which violates both the letter and intent of the APA. The district court mixed inconsistent components of the two separate APA procedures for trying and determining disputed fact issues in a way that insured that *no* trial and determination of disputed fact issues would take place.

Even though there had been no trial and determination of disputed fact issues before the agency, the district court acted as if there had been an adversarial agency trial below pursuant to §§ 556-557. The district court accepted a disorganized and largely irrelevant mass of Corps papers as the agency trial "record". In essence, the district court erroneously—without an

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[11] Petitioners—particularly the railroads who will lose millions as a result of the Corps decision—did argue that they were entitled to procedural due process before the Corps could inflict such economic injury. If the railroads are entitled to *procedural* due process then the doctrine of *Wong Yang Sung* v. *McGrath*, 329 U. S. 33 (1950), would apply and trial of disputed facts would be by the agency under §§ 554, 556-557. The court of appeals held that the petitioners, including the railroads, were not entitled to procedural due process; that *Wong Yang Sung* did not apply; and that consequently no requirement existed that the Corps decision be made "on the record after opportunity for agency hearing" (Appendix C, at pp. C. 29-30). Since the APA clearly provides for trial and determination of disputed fact issues in the district court, there is no need to decide the applicability of the *Wong Yang Sung* doctrine at this time.

[12] *See, Legis. Hist.*, quoted *supra*.

agency trial below—adopted the appellate role that the APA contemplates for the district courts where disputed fact issues are tried and determined in an agency trial pursuant to §§ 556-557.

Continuing to "mix apples and oranges" the district court then accepted evidence outside the illusory paper "record". Taking testimony on the disputed fact issues, the district court began to act as if it was following the APA mandate that the district court be the trier and determiner of disputed fact issues where the agency has not done so pursuant to the procedures of §§ 556-557.[13]

After giving the petitioners this "opportunity" to try these disputed issues of fact the district court then made a 180° about face and refused to make factual findings on these disputed issues. Despite the APA mandate that the court make such determinations, the district court stated that for the court to make findings of fact on disputed factual issues would constitute "substitution of judgment" by the court for the determination of disputed facts by the agency.

Under the APA, the judicially coined maxim against "substitution of judgment" can only apply to agency determinations of disputed issues of fact where the agency has actually tried and determined the disputed facts pursuant to the judicially patterned trial procedures of §§ 556-557. The maxim against substitution of judgment in factual disputes where there has been an agency trial is reflected in the "substantial evidence" appellate role of the courts in reviewing the agency fact findings after a §§ 556-557 proceeding.

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[13] In taking this testimony the district court elicited some highly relevant admissions. For example, one of the key factual tactics used by the Corps has been to make ominous but deliberately vague threatening unspecific comments about "safety" of maintenance techniques. Yet in testimonial exchange the lead Corps witness admitted on cross-examination that low-cost maintenance work was both technically feasible and safe. (*See*, testimony of Homer Willis, Corps engineer, September 18, 1979, TR 144-145).

Where, however, the agency has not conducted a § 556-§ 557 trial on disputed issues, as in this case, the APA framework mandates the district court to try and determine disputed issues of fact. The maxim against substitution of judgment has no role in the APA mandated district court trial and determination of disputed facts.

As a result of the district court's confusion and refusal to follow the APA mandate, petitioners *never* received *any* trial and determination on the disputed fact issues underlying the Corps decision to build Lock and Dam 26. The court of appeals affirmed the district court's refusal to try and determine the disputed fact issues and ignored the clear statutory command of the APA.[14]

In addition, the courts below took other actions regarding the Corps' factual claims which, if condoned by this Court, make it virtually impossible for the judiciary to perform its Article III and APA judicial review function. Contrary to established law the courts failed to require disclosure of the Corps' data and computations which formed the basis of the Corps' factual claims.

The Corps' principal factual claims were that the economic benefits of the project were $86,995,000 and that the economic costs were $44,867,000. The Corps also claimed that because of the traffic distribution of the expanded barge traffic, the upstream environmental impact would be minor.

Of the $86,995,000 in claimed annual economic benefits, $82,678,000 is based on what purports to be a simple arithmetic

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[14] In an amended complaint filed December 12, 1978, in the United States District Court for the District of Columbia, the petitioners sought to challenge the Corps' post-authorization decision to build Lock & Dam 26. Subject matter jurisdiction was founded on 28 U.S.C. § 1331. The district court entered judgment against petitioner on October 23, 1979 (Appendix D) and the United States Court of Appeals for District of Columbia Circuit affirmed this judgment on April 24, 1981 (Appendix C).

computation based on the actual shipper cost differences for bulk commodities shipped between specific actual origins and destinations by barge and by rail. This same shipper cost computation was supposedly the factual basis for the upstream traffic distribution made by the Corps to support its claim that the environmental impact would be minor.

Despite thousands of pages of largely irrelevant materials submitted as part of its paper "record", the Corps never submitted the simple step by step data points and arithmetic calculations which would allow the lower courts or this Court to do the simple arithmetic to obtain $82,678,000. Nor were the data and arithmetic calculations which resulted in the upstream barge allocation claims made available to the lower courts.

Without the Corps arithmetic computations, the courts below were in no position to critically evaluate the accuracy of the $82,678,000 benefit claim or the upstream barge traffic distribution. The Corps could have claimed any numerical value of benefits and any traffic distribution. Without at least access to the underlying arithmetic, the courts below were incapable of performing their judicial review function.

In a separate but related issue the court of appeals rejected petitioners' claim that they did not receive the arithmetic computations and methodology behind the $82,678,000 benefit claim and related barge routing. The court of appeals assumed that a vague and incomplete description of the methodology behind the Corps claims—contained in documents released by the Corps—would allow the courts and petitioners to work from raw numbers to the $82,678,000 benefit claim and barge routing. Since the court of appeals assumed that this vague methodology description would allow petitioners and the courts to make the arithmetic computations themselves, the court of appeals did not require the Corps to disclose its arithmetic computations.

Unfortunately, the court of appeals was absolutely wrong in its assumption. Despite the fact that the Corps has admitted that its computations were simple arithmetic, there is no way that petitioners or the reviewing courts can reproduce the $82,678,000 benefit claim or the concurrent barge routing from the limited material disclosed.

Nor could petitioner railroads effectively develop alternative evidence. Deprived of such essential information as the *actual* origins and destinations of the movements as well as the step by step arithmetic computations used by the Corps and the basis of the barge rates (e.g., contract versus spot), plaintiff railroads could neither verify the Corps' claimed benefits nor develop realistic opposing calculations.[15]

When faced with the challenge of its failure to identify and disclose the data points and arithmetic and methodology leading to its factual claims, the Corps engaged in a tactical ploy designed to create the illusion of disclosure without the substance. The Corps gave petitioners access to millions of pages of documents without identifying the few hundred pages which represented the Corps' arithmetic. Similarly, the Corps piled thousands of virtually irrelevant pages of material in the district court without ever identifying the simple step by step arithmetic which led to its factual claims.

In the absence of these critical data, calculations and methodology, it was simply not possible for either the petitioners or the courts below to rationally evaluate the Corps' factual claims.

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[15] In rejecting petitioners' disclosure concerns, the court of appeals also relied on disputed extra-record factual claims contained in a post-trial affidavit of Anson Eickhorst, a Corps lawyer and economist, made for the first time on appeal without opportunity for cross-examination. In contrast, petitioners' witness, Dr. Haveman, testified in the district court as to the lack of disclosure. While Dr. Haveman was on the stand and fully available for cross-examination, appellants never had an opportunity to cross-examine Mr. Eickhorst.

REASONS FOR GRANTING THE WRIT

I.

There is a Paramount Need for Definitive Guidance as to the Requirements of the APA for the Trial and Determination of Disputed Issues of Fact Underlying Agency Action

Because this Court has not had occasion to articulate the APA-mandated framework for resolving disputed fact issues underlying agency actions, the lower courts have increasingly confused and ignored the APA framework and are improperly fashioning non-statutory "common law" procedures which violate the mandates of the Act. Much of the judicial confusion can be traced to a failure to examine the clear APA legislative history and the failure to appreciate important procedural differences between the two APA mechanisms for trial and determination of disputed facts.

As outlined in the Statement of the Case, the Administrative Procedure Act mandates two simple mechanisms for trying and determining disputed issues of fact underlying agency decisions:

1. *Trial and determination of disputed facts by the agency pursuant to the judicially-patterned procedures of § 556 and § 557.* These agency trials and determinations of disputed fact issues are only required where the statute empowering the agency to act requires the agency decision to be made "on the record after opportunity for agency hearing". 5 U.S.C. § 553(c) (rules); 5 U.S.C. § 554(c) (adjudication).

2. *Trial and determination of disputed facts by the district court when the agency has not conducted the trial and determination of disputed facts pursuant to §§ 556-557.* Where the agency does not and is not required by statute to conduct the § 556-§ 557 trial of disputed fact issues the oft-repeated and unequivocal legislative intent of Congress is that disputed issues

of fact be tried and determined in the district court. *See, Legis. Hist.*, quoted *supra.*

Because one APA mechanism for trial and determination of disputed facts makes the agency the trier of fact with the district court acting in an appellate role, and one mechanism makes the district court the initial trier of disputed fact, there are important procedural differences between the two mechanisms:

a. *The timing of the trial and determination of disputed issues of fact.* Where the agency conducts the trial of disputed issues of fact pursuant to §§ 556-557 because of a statutory "on the record after opportunity for agency hearing" requirement, the trial and determination of disputed issues of fact comes *before* the agency decision. Where, however, there is no requirement that the agency decision be made "on the record after opportunity for agency hearing", the trial and determination of disputed issues of fact comes in the district court—*after* the agency decision.

b. *The burden of proof on disputed fact questions.* Judicial confusion over the APA assignment of burden of proof has led to incorrect lower court rulings that the APA does not require a trial and determination of disputed fact issues. When one examines the assignment of burden of proof by the APA to the two different mechanisms for trial and determination of disputed fact issues, the reasons for the lower courts' errors become clear.

Where the agency conducts the trial and determines issues of fact pursuant to §§ 556-557, the APA assigns the burden of proof to the proponent of the agency rule or order—typically the agency. 5 U.S.C. § 556(d). The key element that has generated judicial confusion lies in the fact that this APA agency trial mechanism—which assigns the burden of proof to the agency—also assigns an appellate role to the district court

under the "substantial evidence" standard. Since the agency has conducted the trial and determined disputed facts, the district court applies the "substantial evidence" test to the agency's trial findings of fact and the district court—acting in an appellate capacity—will not try and determine disputed fact issues.

Where, however, the district court is the initial trier and determiner of disputed fact issues—where no trial has taken place before the agency—the person challenging the agency action has the burden of proof. Thus, although the district court tries and determines the facts *de novo* the agency does not bear the burden of proof. Consequently, where the trial is before the district court the agency faces an easier burden of proof—the burden being placed on the person challenging the agency decision. This trial of disputed facts in the district court—with the burden of proof on the person challenging agency action—has historically focused on the question of whether the agency's conduct is "arbitrary and capricious".

Given this background, it is easy to understand why statements have been made that the "arbitrary and capricious" standard was more lenient on the agency than the "substantial evidence" standard. But this leniency was not due to an elimination of the obligation of trial and determination of disputed facts. This leniency was simply a shift of the burden of proof from the agency (in proceedings with the agency trial and the substantial evidence test) to the person challenging the agency action (in district court proceedings where the district court tried and decided fact issues and applied the arbitrary and capricious test).[16]

[16] The assumption that "arbitrary and capricious" is somehow a more lenient evidentiary standard to justify agency action stems from the dictum of Justice Harlan in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 143 (1967), characterizing the substantial evidence test as imposing a tougher standard of judicial review of evidence than under

(Footnote continued on following page)

Unfortunately, many courts—including the courts below—have taken this concept that the APA provides a more lenient burden of proof for the agency in "arbitrary and capricious" proceedings than in "substantial evidence" proceedings and have erroneously leaped to the conclusion that there should be no trial of disputed facts where the arbitrary and capricious standard is applied. This is clearly error. The refusal of courts to try and determine fact issues in a "substantial evidence" proceeding stems from the fact that the agency has conducted the trial. Where the agency has not conducted a trial on disputed fact issues the courts have always conducted a trial on disputed facts—with the burden of proof on the challenger. *Cf. Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194 (1934).

This distinction between burden of proof for the two different APA methods of trial of disputed issues of fact—and the ultimate requirement that disputed issues of fact be tried—is reflected in the APA Legislative History:

Comment by Senate Judiciary Committee on § 554:

> There should be no disposition to compel administrative hearings where Congress has not already so provided because, as pointed out below in connection with judicial review, the established law permits a trial *de novo*, of the facts in all cases of adjudications where statutes do not require an administrative hearing. Moreover, as to subjects triable *de novo* in the courts, although the administrative procedure may in some instances shift the burden of proof the parties have a right to ultimate full judicial process.
>
> *Legis. Hist.* at p. 22.

(Footnote continued from preceding page)

the "arbitrary and capricious" standard. But that distinction had nothing to do with the APA obligation that there has to be a trial and determination of disputed facts either in an agency trial (§§ 556-557) or *de novo* by the Court. Justice Harlan was instead talking about the differing allocation of *burden of proof*—not that the arbitrary and capricious test abolished the need for a trial of disputed facts.

This unequivocal declaration of legislative intent highlights the analytical confusion and error of the courts below in denying petitioner a trial on the disputed issues of fact underlying the Corps' decision:

> We do not believe, however, that either the Constitution or the APA entitles appellants to a full adjudicatory hearing at the agency level. Nor do we believe that appellants are entitled to *de novo* judicial review of the agency decision, or even to review under the "substantial evidence" standard.
>
> Opinion of the Court of Appeals, Appendix C, at p. C 29.

Virtually all the lower courts which have refused to follow the APA mandated statutory mechanisms for trying and determining disputed issues of fact—including the courts below—have cited this Court's 1971 decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U. S. 402 (1971). The courts have cited *Overton Park* for the proposition that under the APA there need not be a trial and determination of disputed fact issues underlying agency action—either before the agency under §§ 556-557 procedures or before the district court.

Overton Park can be distinguished by pointing out that in that case this Court did not do a detailed examination of the APA statutory framework for trying and determining issues of disputed fact underlying agency action. Certainly there was no examination of the detailed legislative history cited above which clearly states that either the agency conducts the trial and determination of disputed facts pursuant to §§ 556-557 or the district court tries and determines disputed fact issues.

But candidly, *Overton Park* can and has been read to mean that under the APA there need never be a trial and determination of disputed fact issues underlying agency action—either before the agency or before the district court. Such an interpretation is directly contrary to the statutory framework

and legislative history of the APA which mandates trial and determination of disputed fact issues underlying agency action. The error of such an interpretation has been recognized by APA scholars:

> The requirement of a record in informal adjudication derives from *Overton Park*, reaffirmed in *Camp* v. *Pitts*, in both of which the court held that review would be based on what was before the agency and not on a record compiled in a judicial trial de novo. *There is good reason to believe that the court erred in so holding.*
>
> Byse, *Vermont Yankee and the Evolution of Administrative Procedure, A Somewhat Different View*, 91 Harv. L. Rev. 1823, 1830 (1978), (footnote omitted), (emphasis added)
>
> * * *
>
> In 1946 the assumption was that the *factual ingredient* of rulemaking could be *fought out* in a reviewing court, and that the court would make a de novo determination of the facts. The Senate committee, for instance, said: "Where . . . an affected party claims in a judicial proceeding that a rule issued without an administrative hearing (and not required to be issued after such hearing) is invalid, he may show the facts upon which he predicates such invalidity." Sen. Doc. No. 248, 79th Cong., 2d Sess. 214 (1946). The House committee made the same statement and added: "In short, where *a rule or order* is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, *the facts pertinent to any relevant question of law must be tried and determined de novo by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court.*" Id. at 279-280.
>
> K. Davis, *Administrative Law Treatise*, Second Edition, Vol. 1, p. 507 (emphasis added)

See also, Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the*

Administrative Procedure Act and Other Federal Statutes, 75 Col. L. Rev. 721, at 755 and n. 172, and at 763-764 (1975).

To the extent that *Overton Park* is construed as prohibiting trial and determination of disputed issues of fact underlying agency action, it is directly contrary to the APA. *See, Legis. Hist., supra.* Moreover, because such an interpretation is directly contrary to the APA statutory framework, *Overton Park* is encouraging judges and commentators to fashion "common law"[17] ad hoc procedures which make little sense and have no predictability. In 1978 this Court instructed the lower courts to cease such tinkering and adhere to the statutory framework embodied in the Administrative Procedure Act. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U. S. 519 (1978).

II.

This Court Should Reaffirm and Enforce the Holding of *Ohio Bell Telephone* Which Requires Disclosure of the Data and Computations Underlying Agency Factual Claims.

As set forth in detail in the Statement Of The Case, the simple arithmetic—containing the data, methodology and step by step arithmetic computations supporting the Corps' $82,678,000 benefit claim and concurrent upstream barge traffic routing claim—was never presented to the petitioners or the courts.

The Corps' use of undisclosed data, calculations and methodology, and the lower courts' affirmance of the Corps' factual claims without examining the undisclosed material and without ordering the material to be included in the record, raises the following basic issues:

1. Under the Due Process Clause and the Administrative Procedure Act, can the Corps' factual claims—that the economic benefits of the new dam and 1200-ft. lock outweigh the

---

[17] *See, e.g.,* K. Davis, *Administrative Common Law and the Vermont Yankee Opinion,* 1980 Utah L. Rev. 3.

enormous economic and environmental losses—be sustained when the raw data, calculations and the methodology used by the Corps have never been disclosed to the railroad or environmental petitioners?

2. Can the courts perform their Article III constitutional duties and statutory duty under the Administrative Procedure Act to insure that there is evidentiary support for the Corps' factual claims if the raw data and methodology upon which the Corps bases its decision have not only never been disclosed to adversary parties, but also have never been disclosed to the courts?

Both these issues can be answered shortly and swiftly. Persons adversely affected by agency action have a due process right to disclosure, examination, and an opportunity to rebut the raw data and methodology used by an administrative agency in reaching its decision. *ICC* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 91 (1913); *Ohio Bell Telephone* v. *Public Utilities Commission*, 301 U. S. 292, 298-300 (1937); *Ralpho* v. *Bell*, 186 U. S. App. D.C. 368, 569 F. 2d 607, 628 (1977). Even if petitioners had no due process right to disclosure before the Corps made its decision,[18] petitioners certainly were entitled to procedural due process in their post-agency decision court proceedings.

Moreover, the courts have a constitutional and statutory duty to examine the sufficiency of the evidentiary material relied on by the agency in reaching its decision.[19] To perform this function, the reviewing court must have the data and methodology before it. *Ohio Bell Telephone, supra*, 301 U. S. at 303.

The *Ohio Bell Telephone* decision is directly on point on two separate constitutional grounds:

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[18] A point which petitioners dispute but which this Court need not reach.

[19] "A finding without evidence is arbitrary and baseless . . . is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power." *ICC* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 81, 91 (1913).

1. It is a denial of due process for an agency to act against a person on the basis of information "secretly collected and yet never disclosed". 301 U. S. at 300.

2. And there is a second tier of due process when the data is not disclosed at the judicial review level:

> From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that *even we* do not know the particular or evidential facts on which the Commission took judicial notice and on which it rested its conclusion.
>
> 301 U. S. at 302 (emphasis added)

The Supreme Court strongly rebuked the Ohio Supreme Court for blindly accepting the conclusion of the Public Utility Commission.

> In such circumstances *judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?* In expressing that approval the court did not mean that, traveling beyond the record, it had consulted price lists for itself and had reached its own conclusion as to the percentage of decline in value from 1925 onwards. It did not even mean that it had looked at the particular lists made use by the Commission, for no one knows what they were in any precise or certain way. Nowhere in the opinion is there even the hint of such a search. *What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.'*
>
> 301 U. S. at 303-04 (emphasis added)

The courts below, like the Supreme Court of Ohio, took the word of the Corps "as to the outcome of a secret investigation and let it go at that".

The courts simply cannot constitutionally take such action. Here, the Corps has never specified what documents, data and calculations they used and withheld from scrutiny. Nor did the courts ever examine the data and calculations involved. As such, the courts' action was constitutionally impermissible under the holding of the Supreme Court in *Ohio Bell Telephone*.

Petitioners respectfully suggest that the related issues of the need to have the Corps data, calculations and methodology in the record before the reviewing courts—so that the courts can perform their Article III functions—and the issue of disclosure to petitioners are critical to the integrity of this Court's own decision making process, both in reality and in public and professional perception.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

Counsel For Petitioners
The Izaak Walton League of America, et al.

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

JOSEPH D. FEENEY
Western Railroad Association
222 South Riverside Plaza
Chicago, Illinois 60606
(312) 648-7812

Counsel For Petitioners
The Atchison, Topeka and Santa Fe Railway Company, et al.

Appendix

1

No. 81-360

Office-Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Petitioners,

v.

JOHN O. MARSH, JR., Secretary, Department of the Army, *et al.*,

Respondents.

THE IZAAK WALTON LEAGUE OF AMERICA, *et al.*,

Petitioners,

v.

JOHN O. MARSH, JR., Secretary, Department of the Army, *et al.*,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

For The Izaak Walton League of America, et al.

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

For The Atchison, Topeka and Santa Fe Railway Company, et al.

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

JOSEPH D. FEENEY
Western Railroad Association
222 South Riverside Plaza
Chicago, Illinois 60606
(312) 648-7812

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

Filed May 27, 1981
George A. Fisher, Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 79-2529 September Term, 1980

THE IZAAK WALTON LEAGUE
OF AMERICA, et al.,
Appellants

v.

Civil Action
No. 74-1191

JOHN O. MARSH, Secretary
Department of the Army, et al.,

And Consolidated Cases

BEFORE: Robinson, Chief Judge, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges and John G. Penn*, Judge, United States District Court for the District of Columbia

ORDER

Appellants' suggestion for rehearing *en banc* has been circulated to the full Court and no judge of the Court or of the panel has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Mikva did not participate in the foregoing order.

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

APPENDIX B

Filed May 27, 1981
George A. Fisher, Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 79-2529 September Term, 1980

THE IZAAK WALTON LEAGUE
OF AMERICA, et al.,
Appellants

v.

Civil Action
No. 74-1191

JOHN O. MARSH, Secretary
Department of the Army, et al.,
And Consolidated cases

ARGUED
1-16-81

BEFORE: Wright and Robb, Circuit Judges; John G. Penn*, Judge, United States District Court for the District of Columbia

ORDER

On consideration of appellants' petition for rehearing filed May 8, 1981, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

George A. Fisher, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2529

THE IZAAK WALTON LEAGUE OF AMERICA, *et al.*,
APPELLANTS

v.

JOHN O. MARSH, JR., Secretary,
Department of the Army, *et al.*

No. 79-2530

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, *et al.*, APPELLANTS

v.

JOHN O. MARSH, JR., Secretary,
Department of the Army, *et al.*

No. 80-1017

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, *et al.*

v.

JOHN O. MARSH, JR., Secretary,
Department of the Army, *et al.*

ASSOCIATION FOR IMPROVEMENT OF
THE MISSISSIPPI RIVER, APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

C-2

No. 80-1024

IZAAK WALTON LEAGUE OF AMERICA, *et al.*

v.

JOHN O. MARSH, JR., Secretary,
Department of the Army, *et al.*

ASSOCIATION FOR IMPROVEMENT OF
THE MISSISSIPPI RIVER, APPELLANT

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Actions Nos. 74-1191 & 74-1190)

Argued January 16, 1981

Decided April 24, 1981

Joseph V. Karaganis, with whom *Sanford R. Gail*, *A. Bruce White*, and *Joseph D. Feeney* were on the brief, for Izaak Walton League of America, *et al.*, and Atchison, Topeka and Santa Fe Railway Company, *et al.*, appellants in Nos. 79-2529 and 79-2530 and appellees in Nos. 80-1017 and 80-1024. *Jon T. Brown* entered an appearance for Atchison, Topeka and Santa Fe Railway Company, *et al.*, in Nos. 80-1017 and 80-1024.

George V. Allen, Jr., with whom *Ramsay D. Potts* and *William P. Barr* were on the brief, for Association for Improvement of the Mississippi River, appellant in Nos. 80-1017 and 80-1024 and appellee in Nos. 79-2529 and 79-2530.

Dirk D. Snel, Attorney, Department of Justice, with whom *Sanford Sagalkin*, Deputy Assistant Attorney General, and *Jacques B. Gelin*, Attorney, Department of Justice, were on the brief, for the federal appellees. *James W. Moorman*, Attorney, Department of Justice, entered an appearance for the federal appellees.

Before WRIGHT and ROBB, *Circuit Judges*, and PENN,* *District Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: Commercial navigation on the Upper Mississippi River and the Illinois River is made possible through a series of 27 locks and dams known as the Upper Mississippi River Navigation System. Locks and Dam 26, which is located on the Upper Mississippi near Alton, Illinois, is a vital link in this system. Because it stands just south of the juncture of the Illinois and Mississippi Rivers, and just north of the juncture of the Missouri and Mississippi Rivers, it serves as a funnel through which all traffic along these waterways must pass.[1] Almost 13 years ago the Army Corps of Engineers proposed that the existing structure be replaced with a new lock and dam. The Corps believed that a new facility was necessary because the existing structure was deteriorating and lacked sufficient capacity to accommodate increasing barge traffic. After years of planning and several vigorously fought court battles, the Corps obtained legislative approval for the project in 1978, when Congress enacted a bill specifically authorizing construction of the new facility. Act of Congress, September 21, 1978, Pub. L. No. 95–502, 92

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*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

[1] A map of the entire Inland Waterways System appears as Exhibit A to the District Court's final opinion in this case, *see Atchison, Topeka & Santa Fe R. Co. v. Alexander* (*Atchison V*), 480 F.Supp. 980, 1004 (D. D.C. 1979). The District Court issued a total of five opinions. *See also Atchison, Topeka & Santa Fe R. Co. v. Callaway* (*Atchison IV*), 480 F.Supp. 972 (D. D.C. 1979); *Atchison, Topeka & Santa Fe R. Co. v. Callaway* (*Atchison III*), 459 F.Supp. 188 (D. D.C. 1978); *Atchison, Topeka & Santa Fe R. Co. v. Callaway* (*Atchison II*), 431 F.Supp. 722 (D. D.C. 1977); *Atchison, Topeka & Santa Fe R. Co. v. Callaway* (*Atchison I*), 382 F.Supp. 610 (D. D.C. 1974).

STAT. 1693 (P.L. 95–502). The Corps began to make construction plans shortly thereafter.[2]

Before the Corps could proceed with construction of the facility, appellants, 18 midwestern railroads[3] and three environmental groups,[4] renewed an action against the Government[5] that they had originally commenced in 1974. In their amended complaint they sought to halt further work on the project.[6] The Association for the Improvement of the Mississippi River (AIMR) intervened in the District Court on the side of the Government. Although appellants raised a variety of claims, their objections were, in essence,

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[2]*See Atchison V*, *supra* note 1, 480 F.Supp. at 984–990 (describing history of proposal). *See also* Part I *infra*.

[3]The appellant railroads are: Atchison, Topeka & Santa Fe Railway Company; Burlington Northern, Inc.; Chicago & North Western Transportation Company; Stanley E. G. Hillman as Trustee of the property of Chicago, Milwaukee, St. Paul & Pacific Railroad Company; William M. Gibbons as Trustee of the property of Chicago, Rock Island & Pacific Railroad Company; Denver & Rio Grande Western Railroad Company; Elgin, Joliet & Eastern Railway Company; Illinois Central Gulf Railroad Company; Kansas City Southern Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Norfolk & Western Railway Company; St. Louis Southwestern Railway Company; St. Louis-San Francisco Railway Company; Soo Line Railroad Company; Southern Pacific Transportation Company; Toledo, Peoria & Western Railroad Company; and Union Pacific Railroad Company.

[4]The appellant environmental groups are: Izaak Walton League of America; Izaak Walton League of America, Illinois Division; and Sierra Club.

[5]The defendant-appellees are: John O. Marsh, Jr., Secretary of the Army; United States Army Corps of Engineers; and Major General John Norris, Chief of Engineers, Department of the Army.

[6]*See* Amended Complaint, *reprinted at* Joint Appendix (JA) 360-429 (filed Dec. 11, 1978).

that: (1) the cost-benefit analysis prepared by the Corps prior to receiving congressional approval of the project violated the Water Resources Planning Act of 1965, 42 U.S.C. § 1962 *et seq.* (1976), various other statutes, and the Corps' own regulations, 33 C.F.R. Parts 290–295 (1979)[7]; (2) the Corps failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1976)[8]; and (3) the planning conducted by the Corps after receiving congressional authorization did not comply with various statutes and Corps regulations.[9] The District Court dismissed the first set of claims for lack of jurisdiction. *Atchison, Topeka & Santa Fe R. Co. v. Callaway* (*Atchison IV*), 480 F.Supp. 972 (D. D.C. 1979). After conducting a short trial it concluded that the Corps had adequately fulfilled its obligations under NEPA. *Atchison, Topeka & Santa Fe R. Co. v. Alexander* (*Atchison V*), 480 F.Supp. 980, 994–1002 (D. D.C. 1979). As for the arguments regarding post-authorization planning, the District Court found that most of the appellants' claims lacked merit. *Id.* at 987. It concluded, however, that the Corps violated its own regulations when it failed to hold a public

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[7]*See id.* (Counts I, II, IV, V, VI, VII, and IX). The other statutes relied on include the Rivers and Harbors and Flood Control Act of 1970, P.L. No. 91–611, 84 STAT. 1823, and the Department of Transportation Act, 49 U.S.C. § 1656(a) (1976). Appellants also cited the Water Resources Council *Principles and Standards for Planning Water and Related Land Resources* (*Principles and Standards*), 38 Fed. Reg. 24788 (1973), *reprinted at* Statutory Appendix (SA) 191. *See also* Part II *infra* (discussing appellants' claims under these statutes and regulations).

[8]*See* Amended Complaint, *supra* note 6 (Counts III, VIII, and X). *See also* Part IV *infra* (discussing appellants' claims under NEPA).

[9]*See* Amended Complaint, *supra* note 6 (Count XI). *See also* Part III *infra* (discussing appellants' claims with respect to post-authorization planning).

meeting to discuss implementation of the project. *Id.* at 993–994. It decided not to grant an injunction requiring the Corps to hold such a meeting. *Id.* at 1002–1003.

In this appeal the appellant railroads and environmental groups seek review of the District Court's decision. In general we are satisfied with the District Court's disposition of the case. The District Court was clearly correct in holding that it was without jurisdiction to review claims that the cost-benefit analysis prepared by the Corps failed to comply with the Water Resources Planning Act and various other statutes and regulations. We also agree that the Corps' Final Environmental Impact Statement (FEIS) fulfilled its obligations under NEPA. Finally, we agree that the Corps should have held a public meeting after receiving congressional authorization so that it could solicit comments on implementation of the project. We disagree, however, with the District Court's decision not to require such a meeting. Thus we affirm in part and reverse in part, remanding so that the District Court may amend its judgment to require the Corps to hold a public meeting. This meeting should be held within 30 days of the time the judgment, as amended, becomes final. To ensure that the meeting is not an empty formality, the District Court should also enter an order requiring the Corps to respond in writing to the objections made at the meeting. This response should be completed no later than 30 days after the meeting is held.

I. Background

The Corps of Engineers first considered replacing existing Locks and Dam 26 with a new structure in the mid-1960's, when it became concerned about two problems: lack of capacity and structural instability. FEIS Vol. 1 at 1–2. The existing facility consists of a main lock, which is 600 feet long, and an auxiliary lock, which is 360 feet long. It has a maximum annual capacity of 73 million tons. Because the waterways to the north have a capacity of 108 million tons per year, and the waterways to the south have

a capacity of 148 million tons, the Corps feared that the existing structure would act as a bottleneck that would restrict full use of the waterways system and delay shipping. *Id.* at ii, 1–2. These fears were apparently justified. Barges must now wait an average of at least ten hours to pass through the locks. *Id.* at 2; Board of Engineers of Rivers and Harbors Report (BERH Rep.) at 16 (Plaintiffs' Exhibit (PX) 427). Locks and Dam 26, which is founded on wooden piles driven into sand, also has a history of structural problems, including settlement, underseepage, and loss of foundation material. Physical deterioration has led to increased maintenance and operation costs, and may ultimately result in complete breakdown of the facility. FEIS Vol. 1 at 2, 6–11; BERH Rep. at i, 16–18.

Identifying the problems that afflict the current structure has proven to be far easier than finding an acceptable solution. Below we recount the long and complicated history of the Corps' efforts to replace Locks and Dam 26.

A. *Pre-Authorization Planning*

The first proposal to replace existing Locks and Dam 26 was made in 1968, when the Corps' St. Louis District Engineer recommended that a new dam and two 1,200-foot locks be constructed two miles downstream from the existing structure. This recommendation was reviewed by the Board of Engineers for Rivers and Harbors (BERH), which was established by Congress to provide an independent review of water-related projects.[10] The BERH submitted a report to the Chief of the Corps of Engineers in which it ap-

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[10]The Board of Engineers for Rivers and Harbors (BERH) was established by § 3 of the Rivers and Harbors Act of 1902, 33 U.S.C. § 541 (1976). The BERH provides an independent review of any reports concerning water resources that the Corps prepares in response to Acts of Congress or resolutions of congressional public works committees. It submits its conclusions and recommendations to the Corps.

proved the project and recommended immediate implementation. The Chief of Engineers then sent a report to the Secretary of the Army, in which he asked the Secretary to approve construction. The Secretary granted approval, acting pursuant to Section 6 of the Rivers and Harbors Act of 1909, 33 U.S.C. § 5 (1976), which authorizes him to order maintenance and repair of existing navigation facilities. Between 1968 and 1974 the Corps prepared a series of design memoranda, *see* Design Memoranda (DM) (Defendants' Exhibit (DX) 33–43), and an Environmental Impact Statement (EIS) for this two-lock project, *see* EIS (PX 507). Congress appropriated construction funds in 1974. *See Atchison V*, *supra*, 480 F.Supp. at 984–985.

In August 1974, before construction of the replacement facility could start, the same environmental organizations and midwestern railroads that are appellants here filed suits in the District Court seeking to enjoin the project.[11] The District Court immediately granted a temporary restraining order that halted bidding on the construction. Shortly thereafter the court issued a preliminary injunction stopping all further activity. *Atchison, Topeka & Santa Fe R. Co. v. Callaway* (*Atchison I*), 382 F.Supp. 610 (D. D.C. 1974). The court stated that a preliminary injunction was justified because the railroads and environmentalists were likely to prevail on their claim that the Secretary of the Army lacked authority to approve the project under Section 6 of the Rivers and Harbors Act of 1909, 33 U.S.C. § 5 (1976).[12] According to the District Court, that Act applies

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[11] The environmental groups and the railroads originally filed separate complaints. Their actions were consolidated by the District Court.

[12] This statute provides in relevant part that:

> for the purpose of preserving and continuing the use and navigation of * * * canals and other public works without interruption, the Secretary of the Army, upon the recommendation of the Chief of Engineers, United States Army, is authorized to draw his warrant or requisition * * * upon

only when the Corps plans to repair an existing structure. Here, however, the Corps had proposed an entirely new facility. Before such a project can be implemented, Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 (1976), requires that congressional authorization be obtained.[13] 382 F.Supp. at 616–617. The District Court also stated that a preliminary injunction was justified because the plaintiffs were likely to prevail on their claim that the Corps' EIS was inadequate. The court noted that the EIS failed to discuss the systemwide effects of the proposal and to consider reasonable alternatives to the plan. *Id.* at 620–623.

After the District Court issued the preliminary injunction the Corps decided to seek congressional authorization under Section 9 of the Rivers and Harbors Act of 1899 and to revise its EIS. In 1975 the District Engineer for the St. Louis District prepared a Formulation Evaluation Report (FER). *See* FER (DX 43). The FER, which contained a cost-benefit analysis, evaluated a variety of alternatives, including rehabilitation of the existing structure. *Id.*, Vol. 1 at 7–1 to 9–18. It concluded that replacement would be safer and less costly than rehabilitation, and recommended a project identical in scope to that originally proposed in 1968: construction of a new dam with two 1,200-foot locks.

> the Secretary of the Treasury to pay the actual expenses of operating, maintaining, and keeping said works in repair[.]

33 U.S.C. § 5 (1976).

[13] This statute provides in relevant part:

> It shall not be lawful to construct or commence the construction of any * * * dam * * * in any * * * navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army[.]

33 U.S.C. § 401 (1976).

Id., Vol. 1 at 5–17, 10–1 to 10–8. In addition to the FER, the District Engineer prepared a Draft Supplemental Environmental Impact Statement (DSEIS), which discussed the systemwide impact of the two-lock proposal and carefully examined reasonable alternatives to the proposal. *See* DSEIS Vol. 1 at 4–1 to 4–101, 5–1 to 5–9, 6–1 to 6–139 (DX 46).

The BERH reviewed the proposal and issued a report recommending construction of a single 1,200-foot lock rather than a double-lock facility. The BERH agreed with the Corps' determination that, because of the existing facility's structural instability, rehabilitation or replacement was essential. It also agreed with the Corps' conclusion that replacement would be safer and less costly than rehabilitation. BERH Rep. at 89. It argued, however, that the environmental impact of the two-lock proposal, which would more than double the capacity of Locks and Dam 26, was uncertain. *Id.* at 88. A single-lock project, on the other hand, would have an insignificant environmental impact. *Id.* at 89. Although the economic benefits provided by such a project would be less than those provided by the two-lock project, there would be some gain: the capacity of Locks and Dam 26 would still be increased by 18 percent, so shipping delays would be reduced. *See id.* The BERH also noted that the single-lock project could be justified on structural grounds.[14] *Id.* at iv–vi, 89.

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[14]The BERH did not suggest, however, that the two-lock project should be permanently shelved. It stated that two locks were essential to accommodate increased waterway traffic demand. Thus it recommended that the Corps perform additional environmental and economic studies to evaluate the effects of increased traffic through a second lock, and to determine the optimum size of a second lock. Once these studies are completed, the Corps should seek to obtain congressional approval of the second lock. BERH Rep. at 89.

The Corps decided to accept the BERH's recommendation. A new Revised Draft Supplemental Environmental Impact Statement (RDSEIS), *see* RDSEIS (PX 526), and a Final Environmental Impact Statement (FEIS), which incorporated by reference the FER and the RDSEIS, *see* FEIS at 1,[15] were prepared. In March 1976 the Chief of Engineers issued a report describing the new project to the Secretary of the Army. The Secretary terminated his approval of the pending two-lock proposal. He then formally recommended to Congress that it authorize construction of a new dam and single 1,200-foot lock, and that it not authorize a second lock until new studies indicated that one should be constructed. Proposed legislation and the FEIS were transmitted to Congress along with the Secretary's recommendation. *See* Communication from the Assistant Secretary of the Army, Locks and Dam No. 26, Mississippi River, Alton, Illinois, H. Doc. 94–504, 94th Cong., 2d Sess. (August 26, 1976). The Corps also provided Congress with a Supplemental Economic Data Report (SED), updating and revising the cost-benefit analyses contained in the FER. *See* SED (PX 534).

While the Secretary's proposal was pending before Congress, the railroads and environmental groups continued to seek judicial relief. In May 1977 the District Court dissolved the outstanding preliminary injunction, since the Secretary's decision to withdraw approval of the two-lock project removed the possibility of harm to the plaintiffs. *Atchison, Topeka & Santa Fe R. Co. v. Callaway* (*Atchison II*), 431 F.Supp. 722, 725 (D. D.C. 1977). At the same time the court reviewed plaintiffs' standing to seek relief. It recognized a private right of action to enforce Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1976), which provides that an environmental impact statement

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[15]The FEIS also incorporated by reference the EIS prepared by the Corps in 1974, which the District Court reviewed when it issued its preliminary injunction in *Atchison I*, *supra* note 1.

must accompany proposals for legislative action. It also held that appellants possessed standing to enforce this right. 431 F.Supp. at 725–730. Approximately one year later the court considered a motion for summary judgment filed by the railroads and environmental groups. In their motion they argued that the FEIS submitted to Congress by the Corps failed to comply with NEPA and that the cost-benefit analysis performed by the Corps was inadequate.[16] The court denied this motion because it believed there were material issues of fact concerning the system-wide environmental impact of the project and the Corps' calculation of costs and benefits. *Atchison, Topeka & Santa Fe R. Co. v. Callaway* (*Atchison III*), 459 F.Supp. 188, 190–192 (D. D.C. 1978). The court also held that an evidentiary hearing was appropriate to assess the sufficiency of an environmental impact statement under NEPA; review of the FEIS would not be limited to the contents of the administrative record. *Id.* at 192–193. Finally, the court granted a Government motion to dismiss appellants' claims seeking to enjoin the proposal of authorizing legislation.[17] *Id.*

Throughout the period preceding authorization by Congress, the railroads and environmental groups not only sought relief in the courts; they also participated actively at the administrative level. Representatives of appellants attended each of the four public meetings held by the Corps during the pre-authorization stage.[18] Appellants also had

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[16] Defendants filed cross-motions for summary judgment. These motions were also denied. *Atchison III*, *supra* note 1, 459 F.Supp. at 190–192.

[17] Appellants argued that the Corps' decision to propose legislation authorizing construction of a new facility was arbitrary and capricious. The District Court ruled that judicial review of this decision would be inappropriate since it would interfere with the legislative process. *Id.* at 193–194.

[18] These meetings were nonadjudicatory, and were intended to inform the community about the project. *See Atchison V*, *supra* note 1, 480 F.Supp. at 994. *See also* Part III-B *infra*.

an opportunity to comment on the DSEIS, which the Corps circulated to interested parties. They provided lengthy responses, in which they argued that: rehabilitation of the existing structure or investment in railroads were environmentally and economically preferable alternatives to replacement; the traffic increase resulting from the increase in capacity would have an adverse environmental impact; upstream locks would not be able to absorb the traffic increase; and a programmatic environmental impact statement was required because the replacement project was part of a broader program to expand the Upper Mississippi Waterway System. These responses were included and discussed in the FEIS and RDSEIS. *See* FEIS Vol. 2 at 243–247, 265–267, 271–457; RDSEIS Vol. 1, Parts 2, 3; *see generally* FEIS Vol. 1; RDSEIS Vol. 1. Finally, appellants were given an opportunity to comment on the FER, which contained the Corps' economic evaluation of all project alternatives. Again, their responses were included and discussed in the FEIS and the RDSEIS. *See* FEIS Vol. 2 at 243–247, 271–457; RDSEIS Vol. 2, 3. The Corps revised its cost-benefit analysis in part because of appellants' objections. *See* SED Vol. 1 at 5–1 to 5–9.

B. *Congressional Authorization: P.L. 95–502*

Congress considered the Secretary's proposal to replace existing Locks and Dam 26 during 1976 and 1977. Extensive hearings were conducted before House and Senate committees. *See Locks and Dam 26: Hearings Before the Subcommittee on Water Resources of the Senate Committee on Public Works*, 94th Cong., 2d Sess. (1976) ("Senate Hearings 1976"); *Proposed Waterway User Charges and Replacement of Locks and Dam 26: Hearings on S. 712, S. 790, and S. 923 Before the Subcommittee on Water Resources of the Senate Committee on Environment and Public Works*, 95th Cong., 1st Sess. (1977) ("Senate Hearings 1977"); *Replacement of Locks and Dam 26 at Alton, Illinois: Hearings Before the Subcommittee on Water Resources of the House Committee on Public Works*, 95th

Cong., 1st Sess. (1977) ("House Hearings 1977"). The merits of the project were also debated on the floor of Congress. *See, e.g.*, 124 Cong. Rec. S18043–S18052 (daily ed. October 10, 1978) (Senate debate); 124 Cong. Rec. H12695–H12702 (daily ed. October 13, 1978) (House debate).

The appellants participated in the hearings before Congress, raising essentially the same objections they made during the pre-authorization stage. The environmental groups argued that the traffic increase expected from the single-lock facility would have a substantial adverse environmental impact. *See, e.g.*, H.R. Rep. No. 95–545, 95th Cong., 1st Sess. 12 (1977); Senate Hearings 1976 at 417–428; House Hearings 1977 at 341–362. Both the environmentalists and the railroads opposed construction of the replacement facility on the ground that it was part of a plan to expand capacity throughout the waterways system. *See, e.g.*, S. Rep. No. 95–215, 95th Cong., 1st Sess. 6 (1977). The railroads also emphasized the argument that the Corps had failed to give adequate attention to the rehabilitation alternative. *See, e.g.*, Senate Hearings 1977 at 270–292, 344–350. They presented a rehabilitation scheme that they claimed would be safer and less expensive than replacement. *See, e.g.*, H.R. Rep. No. 95–545, *supra*, at 14–15. All of the appellants argued that the Corps had not properly computed the project's economic cost-benefit ratio. *See, e.g.*, Senate Hearings 1976 at 849–909.

Despite the objections raised by appellants, both the House and the Senate committees issued reports recommending authorization of a single-lock replacement facility. S. Rep. No. 95–215, *supra*; H.R. Rep. No. 95–545, *supra*. After the floor debate, Congress enacted Public Law 95–502, in which it authorized construction of a single-lock replacement for Locks and Dam 26 as part of a broad scheme for management of the Upper Mississippi Waterway System. Act of October 21, 1978, P.L. 95–502, 92 STAT. 1693 (1978). P.L. 95–502 also:

(1) requires development of a "master plan" for the Upper Mississippi River System following comprehensive studies of the environmental and economic effects of expanded navigation;

(2) prohibits further expansion of the capacity of any lock, dam, or channel in the system, apart from Locks and Dam 26, until the study has been completed and Congress has approved the master plan; and

(3) establishes a user charge on the inland waterways in order to recover a portion of the public investment in the system.

President Carter signed the bill in October 1978.

C. *Post-Authorization Planning and Litigation*

After P.L. 95–502 was enacted, the Corps of Engineers, acting pursuant to its own regulations, *see* Engineering Regulation (ER) 1110–2–1150 (describing post-authorization procedures), *reprinted at* Statutory Appendix (SA) 178–185, commenced its post-authorization planning. The Chief of Engineers issued a memorandum in which he stated that because the project as authorized did not differ from the project as proposed, and because there had been no major changes in external conditions since authorization, full reevaluation of the project was not necessary; neither the cost-benefit analysis nor the FEIS need be reviewed. Chief of Engineers Memorandum, January 10, 1979, *reprinted at* Joint Appendix (JA) 2406, 2408–2409. The memorandum also directed the St. Louis District Engineer to restate the cost-benefit calculations in current prices and to prepare final engineering plans and specifications. It noted that most of the engineering work had been accomplished in the design memorandum prepared before the District Court enjoined construction of the two-lock project in 1976. *Id.* Acting pursuant to the directive of the Chief of Engineers, the Corps prepared Design Memorandum Supplement No. 2 (GDM Supp. No. 2). *See* GDM Supp. No. 2 (PX 540).

Congress appropriated funds for the project in October 1979 and work commenced the next month.

Appellants responded to the new legislation by renewing their claims for judicial relief. They filed an Amended Complaint in the District Court in which they claimed that the pre-authorization cost-benefit analysis performed by the Corps failed to comply with the Water Resources Policy Act of 1965, 42 U.S.C. § 1962 *et seq.* (1976), the Water Resources Council *Principles and Standards for Planning Water and Related Land Resources* (*Principles and Standards*), 38 Fed. Reg. 24778 (1973), *reprinted at* SA 191, the Department of Transportation Act, 49 U.S.C. § 1656(a) (1976), the Rivers and Harbors and Flood Control Act of 1970, P.L. No. 91-611, 84 STAT. 1823, and the Corps' own planning regulations, 33 C.F.R. Parts 290-295 (1979).[19] They also argued that the Corps had failed to comply with NEPA.[20] Finally, they claimed that the Corps' post-authorization planning was inadequate in several respects.[21]

Before trial the Government moved to dismiss appellants' claim that the pre-authorization cost-benefit analysis had violated the Water Resources Act, the Corps' own regulations, and various other statutes. The District Court conceded that each of the statutes and regulations in question established standards and principles that the Corps must apply in evaluating federal water projects. But the court also noted that the statutes and regulations established these standards primarily for the benefit of Congress; they were intended to aid Congress in deciding whether a particular project should be undertaken. Once the legislature had exercised its judgment by deciding to authorize a project, judicial review of the analysis on which that judgment was

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[19] *See* Amended Complaint, *supra* note 6, JA 360 (Counts I, II, IV, V, VI, VII, and IX).

[20] *See id.* (Counts III, VIII, and X).

[21] *See id.* (Count XI).

based would interfere with the legislative process. *Atchison IV*, *supra*, 480 F.Supp. at 976-980. The District Court refused to grant the Government's motion to dismiss appellants' NEPA claims. It distinguished NEPA from the other statutes, reasoning that NEPA set forth guidelines for agency conduct, not just to benefit the legislature, but also to benefit the general public. *Id.* at 974-975.[22]

In September 1979 the District Court conducted a five-day trial, at which it confronted the two remaining issues: (1) whether the Corps had complied with NEPA, and (2) whether the Corps' post-authorization planning was adequate. Appellants made a variety of arguments with respect to the first question. They claimed that the record was inadequate for review because various calculations made by the Corps in evaluating the environmental and economic impact of the project were based on "secret data"; that the FEIS failed to give enough attention to alternatives to the replacement project; that the Corps should have prepared a programmatic environmental impact statement because the Locks and Dam 26 project was part of a larger plan to expand the entire Upper Mississippi River System; that the FEIS underestimated the adverse environmental impact of the Locks and Dam 26 project; and that the cost-benefit analysis conducted by the Corps, which was referred to in the FEIS, understated the environmental and economic costs attributable to the replacement project. *Atchison V*, *supra*, 480 F.Supp. at 994-1001. Appellants presented their case through the testimony of six expert witnesses—two economists, two biologists, an engineer, and a railroad president. Deposition excerpts and hundreds of documentary exhibits were also produced. The Government responded by putting four of its own economists and engineers on the stand. *Id.* at 989-990.

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[22] Defendants did not move to dismiss appellants' claims with respect to post-authorization procedure. *See Atchison IV*, *supra* note 1, 480 F.Supp. at 979.

After carefully reviewing the evidence, the District Court rejected each of appellants' arguments. It held that the Corps' FEIS adequately fulfilled the Corps' obligations under Section 102 of NEPA, 42 U.S.C. § 4332 (1976). It also ruled that the Corps had fulfilled its substantive obligation under Section 101 of NEPA, 42 U.S.C. § 4331 (1976), to balance the economic benefits of the project against its environmental costs. 480 F.Supp. at 994–1001.

Appellants also made several arguments with respect to the question whether the Corps' post-authorization planning was adequate. First, they claimed that under the Water Resources Planning Act and the Corps' own planning regulations, 33 C.F.R. Parts 290-295 (1979), the Corps should have performed a *de novo* cost-benefit analysis before deciding to go ahead with construction. The District Court rejected this claim, suggesting that a new cost-benefit analysis was not required absent a material change in circumstances. *Atchison V, supra*, 480 F.Supp. at 987.[23]

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[23] The District Court stated:

> Plaintiffs evidently assumed defendants' post-authorization decision to build * * * was still subject to review to determine compliance with the same substantive regulations which were held not to be a basis for review of a legislatively approved proposal. Plaintiffs, however, have neither suggested, *nor proven*, * * * the occurrence of any material change in the eleven months since authorization by Congress. Under such circumstances, it would be pure legerdemain for the Court to review as a "post-authorization agency decision" the same matters which it has held beyond its review as a result of legislative action *before* the agency decision. Accordingly, the Court has not reviewed plaintiffs' claim that defendants' post-authorization decision to build violates the Corps' substantive cost/benefit regulations, 33 C.F.R. pts. 290–295. The Court finds, as a matter of fact, that there have been no material changes in circumstance since Congress acted and it holds, as a matter of law, that absent such changes, a valid claim has not been stated.

[continued]

Second, appellants argued that the Corps had violated its regulations when it failed to hold a public meeting before implementing the project. ER 1110-2-1150, *reprinted at* SA 148, 33 C.F.R. §§ 209.405(d), (f)(5), and 209.410(n)(ii) (1979). The District Court agreed, holding that the Corps must conduct at least one public meeting during post-authorization planning. *Atchison V*, *supra*, 480 F.Supp. at 993-994. It entered a declaratory judgment in favor of appellants on this issue. After balancing the various interests at stake, however, the court decided not to grant injunctive relief requiring the Corps to hold a meeting before going ahead with the project. The court reasoned that the passage of P.L. 95–502 reflected a strong public interest in proceeding with construction of the new lock and dam. Appellants had already participated vigorously at the administrative and legislative levels, and would be unlikely to benefit from an additional meeting. Moreover, the public had an opportunity to comment on the project through their representatives in Congress. Finally, any additional delay would undoubtedly harm the Corps. *Id.* at 1002-1003.

II. Reviewability of Pre-Authorization Cost-Benefit Analysis

Before submitting the Locks and Dam 26 proposal to Congress, the Corps, acting pursuant to the Water Resources Planning Act of 1965, 42 U.S.C. § 1962 *et seq.* (1976), the Water Resources Council *Principles and Standards*, *supra*, SA 191, the Department of Transportation Act, 49 U.S.C. § 1656(a) (1976), the Rivers and Harbors and Flood Control Act of 1970, P.L. No. 91–611, 84 Stat. 1823, and its own planning regulations, 33 C.F.R. Parts 290-295 (1979), conducted a cost-benefit analysis in which it examined the economic and environmmental impact of the single-lock project, as well as several alternatives. It concluded on the basis of this analysis that the

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Atchison V, *supra* note 1, 480 F.Supp. at 987 (emphasis in original).

single-lock project was justified. The analysis was submitted to Congress along with the request that construction of the new facility be authorized. Appellants sought review of the analysis in the trial court, arguing that the Corps failed to comply with the relevant statutes and regulations. The court dismissed this claim, holding that it did not have jurisdiction to review pre-authorization cost-benefit analyses conducted by the Corps. We agree with this conclusion.

The Water Resources Planning Act of 1965 establishes the inter-agency Water Resources Council and directs the Council to establish "principles, standards, and procedures" for the "formulation and evaluation" of federal water projects. 42 U.S.C. § 1962a-2 (1976). The primary goal of this legislation was to provide Congress with guidance in its planning efforts in the water resources field; Congress hoped that it would be better-equipped to evaluate various development projects. *See* H.R. Rep No. 169, 89th Cong., 1st Sess. 3, 5 (1965). In 1973 the Water Resources Council issued its *Principles and Standards*, *supra*, 38 Fed. Reg. 24778-24868, SA 191-283. The Council stated that in general projects should be evaluated by measuring their costs and benefits in light of two objectives: national economic development and environmental quality. SA 194. More specifically, the *Principles and Standards* provide that a planning organization should consider several alternative plans for dealing with a problem. It should evaluate the economic and environmental costs and benefits of each of these alternatives. A plan should be recommended to Congress only if its net economic benefits are positive, unless economic benefits have been foregone or economic costs incurred in order to enhance environmental quality. SA 199-200.[24]

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[24]The *Principles and Standards* are clearly designed to aid Congress in its pre-legislative evaluation of water resources projects. By their terms they are made applicable only to three levels of planning, all of which are pre-authorizational: Level A (national or regional "framework studies"), Level B (regional or

The Department of Transportation Act provides the Water Resources Council with additional authority to establish standards governing economic evaluation of water resource projects. 49 U.S.C. § 1656(a) (1976). It also sets forth a definition of "primary direct navigation benefits" and states that this definition should be employed whenever agencies evaluate water projects. *Id.* Like the Water Resources Planning Act, this statute was intended primarily to assist the legislature in deciding whether to approve particular projects.[25] The Rivers and Harbors and Flood Control Act of 1970 requires the Corps to develop guidelines to assure that "possible adverse economic, social, and environmental effects" relating to any project are fully considered. P.L. No. 91-611 § 122, 84 STAT. 1818. This statute also was clearly intended to assist Congress in evaluating water projects; the statute provides that the guidelines are to be applied in all proposals that the Corps submits to Congress.

The Corps' cost-benefit analysis regulations, 33 C.F.R. Parts 290-295 (1979), implement the commands embodied in these statutes and in the *Principles and Standards*. They are based primarily on the criteria described by the Water Resources Council in its *Principles and Standards*, *supra*.[26] They provide that projects are to be evaluated in

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river basin studies), and Level C (pre-authorization planning surveys). *Principles and Standards*, *supra* note 7, SA 203.

[25]The Department of Transportation Act gives the Water Resources Council additional authority. As we have already seen, *see* text at note 24 *supra*, the Council was created primarily to assist Congress in evaluating water projects.

[26]As we have seen, the Water Resources Council derives its authority from the Water Resources Planning Act of 1965 and the Department of Transportation Act of 1970. *See* text at notes 24-25 *supra*. The definition of "ordinary direct navigation benefits" set forth in the Department of Transportation Act is included in the Corps' Engineering Regulations, ER 1120-2-114, *reprinted at* SA 186.

light of their economic and environmental costs and benefits. The planning regulations also contain the guidelines required by the Rivers and Harbors and Flood Control Act of 1970. *See* 33 C.F.R. Part 294 (1979); *see generally id.* Parts 290–295 (describing multi-objective planning framework outlined in Rivers and Harbors and Flood Control Act of 1970). Like the statutes, the regulations reflect the fact that the cost-benefit analysis is intended to assist Congress; the regulations state that they "provide[ ] the basis for selecting [a plan] and, if appropriate, recommending it for authorization." *Id.* § 290.11.[27]

Because these statutes and regulations indicate that the cost-benefit analysis is prepared for the benefit of Congress, we do not believe that they give the federal courts jurisdiction to review that analysis, once the legislature has made its decision to approve or not to approve a project. In deciding whether authorization should be granted, Congress will itself review the analysis and determine whether it has been conducted properly. Once it has made this determination, the courts should not interfere. *See Aichison V, supra*, 480 F.Supp. at 990. *See also Environmental Defense Fund, Inc. v. Alexander*, 501 F.Supp. 742, 754–760 (N.D. Miss. 1980). We note, in any event, that judicial review would be contrary to the express language of the

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[27] The regulations also state that they are applicable to all "Level C" pre-authorization studies. 33 C.F.R. § 290.12(c) (1979). Level C studies are one of three levels of planning listed in the Water Resources Council's *Principles and Standards*. *See* note 24 *supra*. It is true that the regulations will be applicable to certain post-authorization studies. 33 C.F.R. § 290.12(d) (1979). As we explain below, however, *see* text at notes 31–34 *infra*, this will be true only in special circumstances, where the Corps has determined that because of a major change in conditions reevaluation of an approved project is necessary. It does not affect our conclusion that the cost-benefit regulations are intended primarily to assist Congress in its pre-legislative activities.

Water Resources Planning Act, which states that it does not in any way "limit the authority of Congress to authorize and fund projects[.]" 42 U.S.C. § 1962-1 (1976).

The absence of any need for judicial interference is amply demonstrated by the facts of this case. The legislative record of P.L. No. 95-502 shows that Congress gave extensive consideration to claims that the Corps had not properly computed the replacement project's costs and benefits. For example, appellants argued before Congress that a modest increase in traffic from Locks and Dam 26 would cause congestion on the Illinois River and lead to significant "delay costs." *See, e.g.*, Senate Hearings 1976 at 849-909. Congress explicitly rejected this and all other arguments challenging the cost-benefit ratios; both the House and Senate Reports adopt, with minor adjustments, the cost-benefit analysis prepared by the Corps. H.R. Rep. No. 95-545, *supra*, at 17-18; S. Rep. No. 95-215, *supra*, at 5.[28]

Additional support for our conclusion is provided by decisions that have confronted the question whether the courts have jurisdiction to review cost-benefit analyses performed by the Corps pursuant to the Flood Control Act of 1936, 33 U.S.C. § 701a (1976). That statute, like the statutes and regulations at issue here, directs the Corps to submit cost-benefit analyses to Congress. It has consistently been held

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[28]The Corps first estimated that the cost-benefit ratio for a single-lock replacement facility was 3.9. FER Vol. 1 at 8-9 (Table 8-7); FEIS Vol. 1 at 19. The Corps subsequently revised the ratio downward to 2.8 because of changed traffic projections. SED Vol. 1 at 8-27 (Table 8-3); FEIS Vol. 2 at 86. The House and Senate revised the ratio downward to 2.4 to account for changes in price levels and shifts in petroleum and coal traffic. S. Rep. No. 95-215, 95th Cong., 1st Sess. 7-8 (1977); H.R. Rep. No. 95-545, 95th Cong., 1st Sess. 17-18 (1977). The General Design Memorandum (GDM) Supplement No. 2 revised the ratio downward to 2.1 primarily to account for additional changes in prices. GDM Supp. No. 2 at 20-20.

that determination of economic costs and benefits is a matter of legislative judgment and that, since the analyses are performed for Congress, the legislative branch rather than the judiciary is best suited to review their adequacy. *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527–528 (1941); *United States v. West Virginia Power Co.*, 122 F.2d 733, 738 (4th Cir.), *cert. denied*, 314 U.S. 683 (1941) ("So far as the benefit exceeding the cost is concerned, this was a matter of legislative policy * * *."); *Environmental Defense Fund, Inc. v. Froehlke*, 368 F.Supp. 231, 240–241 (W.D. Mo. 1973), *aff'd*, 497 F.2d 1340 (8th Cir. 1974) ("questions of fact involved in connection with the ultimate resolution of conflicting data in regard to the determination of benefit-cost ratios 'are solely a matter for congressional determination'"); *Cape Henry Bird Club v. Laird*, 359 F.Supp. 404, 413 (W.D. Va.), *aff'd per curiam*, 484 F.2d 453 (4th Cir. 1973); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 348 F.Supp. 916, 925 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974) ("any question as to the adequacy or accuracy of defendants' economic and technical analysis must be addressed to the Congress"); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F.Supp. 728, 740 (E.D. Ark. 1970), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert denied*, 412 U.S. 931 (1973) (it is for Congress to determine in authorizing a water resources project whether benefits are in excess of the estimated costs). These decisions clearly lend support to our conclusion that review of cost-benefit analyses should not be available under the statutes and regulations relied on by appellants.[29]

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[29] As the District Court noted, *see Atchison V*, *supra* note 1, 480 F.Supp. at 978 n.2, further support for this conclusion can be found in *Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d 29 (3d Cir. 1976). In that case the Third Circuit held that a cost-benefit analysis of a dam project prepared by the Soil Conservation Service after a congressional committee had

Our conclusion that the cost-benefit analysis may not be reviewed to determine compliance with the Water Resources Planning Act, the Department of Transportation Act, the Rivers and Harbors and Flood Control Act of 1970, and the Corps' cost-benefit regulations does not completely insulate the analysis from judicial review. Later in this opinion we hold that the Corps' analysis is reviewable to determine whether the Corps complied with its substantive obligations under Section 101 of NEPA, 42 U.S.C. § 4331 (1976), which requires agencies to weigh the economic benefits of a project against its environmental costs. *See* Part IV–A, G *infra*. The Corps relied on its cost-benefit analysis in concluding that the Locks and Dam 26 project would not have an unjustifiable adverse environmental impact.

III. Post-Authorization Planning

A. *Post-Authorization Decision to Implement the Project*

Appellants argue that after Congress has passed authorizing legislation the Corps makes a *de novo* evaluation of the project, repeating all pre-authorization economic and environmental studies. On the basis of these studies the Corps computes a new cost-benefit ratio, and makes a new determination whether to build or not to build. But appellants seriously misunderstand the nature of the post-authorization planning conducted by the Corps. The Corps does not reevaluate *ab initio* every project that has been approved by Congress. The Corps' Engineering Regulation, ER 1110–2–1150, SA 148, states that the central purpose of post-authorization planning is to execute the

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appropriated funds for the project was subject to judicial review. *Id.* at 34–35. The Third Circuit distinguished cases like this one, where "Congress had *specifically authorized* the projects * * * after receiving and reviewing" the cost-benefit analysis and after consideration of the project's economic merits. *Id.* at 35 (emphasis added).

congressional decision, or "to establish the most suitable overall plan for accomplishment of the authorized improvement and to establish the basic design of the project features." *Id.* Post-authorization planning consists largely of advanced engineering and design work on the project that results in the issuance of one or more "General Design Memoranda." *Id.* 150.[30]

It is true that the Corps makes a post-authorization decision whether to implement the approved project. This decision is more limited in scope than appellants suggest, however. Changes in external conditions may require a new project design or otherwise fundamentally alter the assumptions on which economic feasibility was originally premised. Thus at the outset of post-authorization planning the Corps will determine whether the project should be reaffirmed as authorized, or whether changes in circumstances warrant reformulation of the project. ER 1110-2-1150 at SA 148, 150, 153-159.[31] In those rare situations where the Corps concludes that such changes have occurred and that reformulation is necessary, a new cost-benefit analysis may be conducted pursuant to the cost-benefit guidelines set forth at 33 C.F.R. Parts 290-295

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[30] General Design Memoranda (GDM's) will normally be submitted in two phases. The "Phase I" GDM's are studies or investigations necessary either to reaffirm the authorized project or to reformulate the project to meet changes in external conditions. *See* ER 1110-2-1150 at SA 150; *see also* the discussion in text at note 31 *infra*. The "Phase II" GDM will be concerned primarily with the technical design of the structure. *See* ER 1110-2-1150 at SA 150.

[31] The Corps' regulations list several factors that should be considered in determining whether a project can be reaffirmed. These factors include, for example, changes in economic conditions, changes in state or local interests affected by the project, or new legislation affecting the project formulation. *See* ER 1110-2-1150 at SA 153-154.

(1979). *See* 33 C.F.R. § 290.12(d) (1979).[32] The Corps may also decide to revise the environmental impact statement. Or the Corps may decide that because of a change in conditions an authorized project should be shelved.[33] *See* McKinney Deposition at 21–29, 48–49 (PX 294); Cohn Deposition at 68–69, 74, 142–143 (PX 301).[34]

The post-authorization planning in this case followed the general pattern just outlined. Planning commenced in January 1979, about three months after enactment of P.L. 95–502. In a memorandum addressed to the District Engineer for the St. Louis District, the Corps' Chief of Engineers stated that no significant change had occurred since authorization, and that no updating of the economic analysis or the environmental impact statement was required. *See* Chief of Engineers Memorandum, January 10, 1979, JA 24–26, 2408–2409. After reaffirming the project, the Chief ordered preparation of a Design Memorandum containing

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[32] The cost-benefit regulations state that their applicability to post-authorization studies "is dependent upon the date the project was authorized by Congress and the extent of changes recommended to the authorized project." 33 C.F.R. § 290.12(c) (1979).

[33] According to the Government and appellant AIMR, the Corps most frequently decides that reformulation of a project is necessary when considerable time has passed between the authorization date and the date that post-authorization planning commenced. *See* brief for federal appellees at 51–52; brief for AIMR at 58.

[34] Post-authorization studies also play a role in the Corps' budgetary planning. In the course of deciding whether an authorized project should be reaffirmed, the Corps examines that project in relation to its overall program. Pursuant to ER 11–2–240, an internal budgeting guideline, it will classify the project in one of three categories—"active," "deferred," or "inactive." The Corps ordinarily seeks funding only for programs that have been classified as active. *See* Cohn Deposition at JA 3140–3141, 3149, 3180.

the advanced engineering and design work necessary before construction could begin. He also ordered that the Design Memorandum restate project costs and benefits in current prices. *Id.* The GDM was completed on May 17, 1979. *See* GDM Supp. No. 2.[35]

Appellants argue that even if the Corps did not conduct a *de novo* analysis of this project, and even if its internal regulations, ER 1110-2-1150, do not ordinarily require such analysis, the Water Resources Planning Act, the Water Resources Council's *Principles and Standards*, and the Corps' own cost-benefit regulations, 33 C.F.R. Parts 290-295 (1979), require a new analysis. But as we have already seen, the Water Resources Planning Act and the Water Resources Council's *Principles and Standards* develop criteria to be used in evaluating water projects before they are submitted to Congress for authorization. Nothing in the Act or the *Principles and Standards* requires a post-authorization analysis. *See* Part II *supra*. And the Corps' cost-benefit regulations, which implement the Act and the *Principles and Standards*, are also intended primarily to apply to pre-authorization studies. It is true that they may be used if the Corps decides that a substantial change in circumstances warrants a complete reevaluation. *See* 33 C.F.R. § 290.12(d) (1979); text and note at note 32 *supra*. But nothing in the regulations requires the Corps to

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[35] Ordinarily, "Phase I" and "Phase II" GDM's will be prepared. *See* note 30 *supra*. As the Chief of Engineers noted, however, much of the work required by the post-authorization regulations was performed at an earlier stage, before the District Court enjoined the two-lock project in *Atchison I*, *supra* note 1. A large portion of the advanced engineering and design work had already been completed, and GDMs had already been prepared. *See* Chief of Engineers Memorandum, January 10, 1979, at 2408-2409; *see also* GDMs (DX 33-43). Rather than require new GDMs, he simply ordered the preparation of a supplement to the existing GDMs. *Id.* at 2409.

reevaluate every project during the post-authorization stage.

In addition to their claims about the scope of the Corps' post-authorization decisions, appellants raise several claims regarding: (1) the procedures the Corps must follow in making its post-authorization decisions, and (2) judicial review of those decisions. First, they suggest that under the Due Process Clause of the Constitution the Corps must conduct a full adjudicatory hearing before deciding to go forward with a project. If it fails to conduct such a hearing, then any disputed issues of fact must be tried *de novo* in the courts. Second, appellants suggest that they are entitled to a full evidentiary hearing under Sections 556 and 557 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 556, 557 (1975). The courts must review the decision reached as a result of this hearing by applying the "substantial evidence" standard set forth in the APA, 5 U.S.C. § 706(2)(E) (1976). Appellants go on to suggest that if no adjudicatory hearing is provided at the agency level, then they are entitled to *de novo* review in the courts under Section 706(2)(F) of the APA, 5 U.S.C. § 706(2)(F) (1976). We find that these claims are without merit. We agree that the Corps' decision to implement an authorized project should be subject to judicial review, since it is a final agency decision. 5 U.S.C. § 704 (1976). We do not believe, however, that either the Constitution or the APA entitles appellants to a full adjudicatory hearing at the agency level. Nor do we believe that appellants are entitled to *de novo* judicial review of the agency decision, or even to review under the "substantial evidence" standard.

The Constitution plainly does not require a full hearing either before the Corps or in the courts. The protections of the Due Process Clause are extended only when a "property" or "liberty" interest has been threatened. But generalized environmental concerns do not constitute a property or liberty interest. *See, e.g., Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Federal Employees for Non-Smokers' Rights v.*

United States, 446 F.Supp. 181, 184–185 (D. D.C. 1978), *aff'd*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979). Nor can the railroads' interest in avoiding competition be viewed as a property or liberty interest creating a right to procedural due process. *See, e.g., Wells Fargo Services Corp. v. Georgia Public Service Comm'n*, 547 F.2d 938 (5th Cir. 1977); *see also United States v. Dixie Highway Express*, 389 U.S. 409 (1967) (*per curiam*); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974).[36]

As for their rights under the APA, nothing in that act or any other statute entitles appellants to a full adjudicatory hearing at the agency level. Under the APA, a formal adjudication is necessary under Sections 556 and 557 only when some statute requires a determination "on the record after opportunity for an agency hearing." 5 U.S.C. § 554 (1976). There is no statute setting forth such a requirement for the Corps. Although we hold below, *see* Part III–B *infra*, that the Corps must conduct a public meeting at some point during the post-authorization stage, that meeting is nonadjudicatory. Post-authorization decisions to implement a project should be viewed as an example of "informal" adjudication. *Cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401

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[36]The cases relied upon by appellants are clearly inapposite. For example, two cases involve classic adjudication of property rights. *See Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978) (right to specific land); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977) (right to compensation for war damage). Another involved a threat to personal liberty. *See Wong Yang Sung. v. McGrath*, 339 U.S. 33 (1950). Two cases involved statutory rights to hearings. *See Ohio Bell Tel. Co. v. Public Utility Comm'n*, 301 U.S. 292 (1937); *ICC v. Louisville & Nashville R. Co.*, 227 U.S. 88 (1913). Two other cases hold only that litigants must be given an opportunity to prove facts on which they base a claim that a statute is unconstitutional. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Borden's Farm Products v. Baldwin*, 293 U.S. 194 (1934).

U.S. 402 (1971) (decision to build highway is not formal adjudication).[37]

As for the scope of judicial review under the APA, appellants would have us ignore the Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe, supra.*[38] In that case the Supreme Court held that Section 706(2)(F) requires *de novo* review in only two circumstances: "when the action is adjudicatory and the agency factfinding procedures are inadequate," or "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Id.* at 415. Neither situation exists here. Moreover, the "substantial evidence" standard of Section 706(2)(E) does not apply. Review under that section is necessary only when the agency action is "taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, * * * or when the agency action is based on a public adjudicatory hearing." *Id.* at 414. But the Corps is not exercising its rulemaking powers. And as we have already stated, no adjudicatory hearing is required. We believe that the Corps' decision to go forward with the project should be reviewed under the "arbitrary and capricious" standard of review set forth in Section 706(2)(A), 5 U.S.C. § 706(2)(A) (1976). *Cf. Overton Park, supra* (decision

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[37] The APA itself does not use the term "informal adjudication." Informal adjudication is a residual category including all agency actions that are not rulemaking and that need not be conducted through "on the record" hearings. The APA fails to specify the procedures that must be followed for agency actions that fall within this category. *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 481, 524–526 (1979); Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976). We do not in this opinion purport to make any general pronouncements regarding the procedural requirements for informal adjudication.

[38] More accurately, appellants would have us overrule *Overton Park*, since in their view the Supreme Court's analysis is not consistent with the framework of the APA. *See* reply brief for appellant environmental groups and railroads at 79–82.

to build highway is subject to "arbitrary and capricious" standard of review).

To summarize, the Corps makes a post-authorization decision to implement the project after determining whether there have been significant changes in circumstances. This decision, which constitutes informal adjudication, is reviewable under the "arbitrary and capricious" standard. In our view, the Corps' conclusion that there had been no major change in circumstances warranting reevaluation, and that the authorized project should be reaffirmed and implemented, was not arbitrary or capricious. Like the District Court, *see Atchison V*, *supra*, 480 F.Supp. at 987, 1001, we do not believe that any material changes affecting the economic or environmental soundness of the replacement facility occurred after passage of P.L. 95–502. Appellants point to three "events" they believe constitute material changes. First, they note a 1979 report estimating the capacity of replacement Locks and Dam 26 to range from 96 to 101 million tons per year. *See* Waterway Experiment Station Report (PX 300). They argue that congressional approval was based on a proposed capacity of 86 million tons. But appellants fail to recognize that these revised capacity figures are well within the range of capacity estimates disclosed to Congress in the FER and the RDSEIS. *See* FER Vol. 3 G–1 to G–40, G Att-1 to G Att-180; RDSEIS Vol. 1 at 6–24, 6–144, Tables 6–5 and 6–32 (capacity up to 109 million tons); *see also*, *e.g.*, FEIS Vol. 2 at 235, 279–284, 310–322, 338–355, 367–371, 443–450 (critiques of capacity estimates): Senate Hearings 1977 at 696–714, 794–805. Second, appellants note that the GDM Supp. No. 2 adjusted the cost-benefit ratio to account for 1978 prices. *See* GDM Supp. No. 2, 20–11 to 20–14.[39] But these revisions were based on data developed at the time of or prior to enactment of the 1978 authorizing legislation. Moreover, even after the revisions

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[39] The cost-benefit ratio was also revised to account for changes in lock capacity estimates and traffic projections. *See* GDM Supp. No. 2 at 20–14 to 20–17.

were made the benefit-cost ratio remained above unity.[40] Finally, appellants point to a 1979 report discussing in detail the possibility of rehabilitating existing Locks and Dam 26. GDM Foundation and Test Program (DX 80d). As the Government explains, however, this report was originally commissioned prior to the enactment of P.L. 95–502. After Congress authorized the replacement project, the Corps concluded that the rehabilitation alternative had been mooted. It nonetheless decided to permit completion of the report, because it would be of general interest to members of the engineering profession. *See* Chief of Engineers Memorandum, January 10, 1979, at JA 2406. In any event, the Corps was able to produce ample evidence supporting its decision not to pursue rehabilitation. *See* Part IV–D *infra*.

B. *Post-Authorization Public Meeting*

At the outset of post-authorization planning, the Chief of Engineers decided that a post-authorization public meeting would not be necessary since no significant changes had occurred after the enactment of P.L. 95–502. *See* Chief of Engineers Memorandum, January 10, 1979, at JA 2406–2409.[41] The District Court found that this decision violated Corps regulations. *Atchison V*, *supra*, 480 F.Supp. at 993–994. The court ruled that the Corps should have held an informal nonadjudicatory public meeting in order to inform the community about the proposed project and to elicit views on implementation. It decided not to enter an order requiring such a meeting, however. We agree with the District Court that a public meeting should have been

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[40] Because of the revisions in the price data, as well as the changes described in note 39 *supra*, the Corps revised the benefit-cost ratio downward to 2.1. *See* GDM Supp. No. 2 at 20–20. Under the circumstances, it is clear that the economic viability of the project had not been affected. *See id.* at 20–19.

[41] He also noted that public meetings had been held during pre-authorization planning. *See* Chief of Engineers Memorandum, January 10, 1979, at JA 2406, 2409.

held, but disagree with its decision not to require a meeting.

The general policy of the Corps is to conduct their programs in "an atmosphere of public understanding * * *." 33 C.F.R. § 209.405(c) (1979). Consistent with this policy, Corps regulations provide that "at least one public meeting will be held in connection with the preconstruction planning of authorized projects." 33 C.F.R. § 209.405(f)(5) (1979). The Corps and AIMR argue that this regulation is precatory only[42]; they point out that 33 C.F.R. § 209.405 purports to do no more than set forth "policy, responsibility and guidance for holding * * * public meetings in connection with all Civil Works planning activities * * *."[43] But as the District Court observed, the interest in public participation, which is reflected in several other regulations explicitly stating that meetings should be held, strongly supports the conclusion that the requirement is mandatory. The Corps' NEPA regulations explicitly state that "[p]ublic meetings * * * will be held during post-authorization planning studies to insure that views of interested parties will be considered in the development of the plan and that all interested parties will be kept informed of study progress." 33 C.F.R. § 209.410(n)(ii) (1979). And the Corps' internal regulations state that "one or more public meetings or workshops should be held during

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[42] The Chief of Engineers apparently believed that the regulations were precatory. *See id.*; text at note 41 *supra*. It is true that an administrator's interpretation of his own regulations is entitled to some deference. Nonetheless, where that interpretation is contradicted by strong evidence, it need not be followed. *See Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975); *Udall v. Tallman*, 380 U.S. 1, 16–18 (1965); *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413–414 (1945).

[43] The regulations also state that "[p]ublic meetings will be held when needed, in keeping with the policy and purposes stated herein, generally * * *." 33 C.F.R. § 209.405(f) (1979).

post-authorization planning studies to insure that views of interested parties will be considered in the development plan and that all interested parties will be kept informed of study progress."[44] ER 1110-2-1150 at SA 162.[45]

Instead of requiring the Corps to conduct such a meeting before proceeding with construction of Locks and Dam 26, the District Court simply entered a declaratory judgment in favor of appellants. *Atchison V*, *supra*, 480 F.Supp. at 1002-1003. After noting that equitable relief is committed to the discretion of the court, it provided several reasons which led it to conclude that the Corps should not be required to hold a meeting. First, Congress had authorized the project after carefully considering all objections, and had decided that construction should begin. An order requiring the Corps to hold a public meeting might unduly delay implementation of this legislative decision. Second, appellants would not benefit from a public meeting, since they had already participated vigorously at the administra-

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[44] The regulations also provide that additional meetings should be held when there have been significant changes in the authorized project. The District Court suggested that these provisions would seem to apply here. 33 C.F.R. § 209.410(n)(ii) (1979); ER 1110-2-1150. Although public meetings were held prior to congressional authorization of the project, none have been held for seven years. Moreover, the authorized project has changed. At the time those meetings were held the Corps was still planning a two-lock facility; no public meetings have been held regarding the single-lock proposal. *See* text at pp. 36-37 *infra*.

[45] Even if the regulations are not mandatory, we believe that the decision not to conduct a public meeting during post-authorization planning was an abuse of discretion. The same arguments that led us to conclude that the District Court erred when it decided not to require a meeting to be held also support a finding that the Corps abused its discretion when it chose not to hold a meeting. *See* text at pp. 36-37 *infra* (discussing reasons why meeting should have been required).

tive and legislative levels. Third, the public had already received an opportunity to comment on the project through their representatives in Congress. Under the circumstances, reasoned the court, a public meeting might be "vain or useless." *Id.* at 1002-1003. However, the court did urge the Corps to "conduct their own evaluation of the situation and to hold a meeting if they find that one may be reasonably scheduled." *Id.* at 1003.

In our view, the District Court should have required the Corps to hold a public meeting. It is true that the decision whether to grant equitable relief ordinarily rests in the discretion of the trial court. *Cf. Realty Income Trust v. Eckerd*, 564 F.2d 447, 457 (D.C. Cir. 1977) (injunctive relief need not be provided for every violation of NEPA); *State of Alaska v. Andrus*, 580 F.2d 465, 485-487 (D.C. Cir. 1978) (same). But we do not believe that this discretion was properly exercised here. When an agency has clearly violated its own public meeting regulations, there should be a presumption in favor of an order requiring a meeting. *Cf. Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 513 (D.C. Cir. 1974) (presumption in favor of injunction in NEPA cases); *Realty Income Trust v. Eckerd*, *supra*, 564 F.2d at 456 (same). This presumption should be particularly strong in cases like this one, where the project in question will have a wide-ranging impact. As the District Court observed, the economic and environmental impact of replacement of Locks and Dam 26 "may eventually be felt in every home and farm in the Midwest. Moreover, at stake is the soundness, utility and beauty of perhaps the greatest water resource on the continent—the Upper Mississippi and its tributaries." *Atchison V*, *supra*, 480 F.Supp. at 994. The public has not had an opportunity to participate in the decisionmaking process since 1975, when the last public meetings were held. Indeed, although four public meetings were held prior to that time, they focused on the two-lock proposal; no meeting has ever been held regarding the single-lock proposal. If the fact that the public was represented in Con-

gress vitiates the need for a post-authorization meeting, then such meetings would never be required. It may be that the benefit provided by the meeting will be relatively small. But the Corps' regulations require such a meeting, and there is no good reason why one should not be held. Thus we remand to the District Court so that it may amend its judgment to require a public meeting. This meeting should be held not later than 30 days after the time the judgment, as amended, becomes final.[46]

We emphasize that this meeting should be more than a mere formality. The Corps must receive any comments with an open mind. As the District Court noted, "A public meeting after an agency has already made its decision would be an empty gesture." *Atchison V, supra*, 480 F.Supp. at 1003. *See Nat'l Tour Brokers Ass'n v. ICC*, 591 F.2d 896 (D.C. Cir. 1978). To ensure that the meeting is more than a formality, the District Court should also enter an order requiring the Corps to respond in writing to any objections made at the meeting. This response should be prepared within 30 days of the date the meeting is held. Such a response will not constitute a substantial departure from ordinary Corps practice; responses have been prepared in the past. *See* RDSEIS Vol. 3 § 9.5.3; *see also* 33 C.F.R. § 209.405(a) (1979) (requiring preparation of record of public meetings).

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[46] At this meeting there will be no need to address matters that were resolved by Congress when it enacted P.L. 95-502. In addition, it will not be necessary to consider issues decided in this opinion. Thus, for example, no more attention need be given to the adequacy of the pre-authorization cost-benefit analysis or the FEIS.

We also emphasize that, despite our decision to require a meeting, we affirm that portion of the District Court's judgment which denied appellants' request for an injunction halting work on the Locks and Dam 26 project. It is possible that as a result of the meeting the Corps might decide that its plans should be altered. In the interim, however, it may go forward with construction.

IV. Compliance with NEPA

The appellants argue that the FEIS prepared by the Corps pursuant to Section 102 of NEPA, 42 U.S.C. § 4332 (1976), is deficient in several respects. They also argue that the Corps failed to fulfill its substantive obligations under Section 101 of NEPA, 42 U.S.C. § 4331 (1976). After deciding that it had jurisdiction to review these claims, *Atchison IV*, *supra*, 480 F.Supp. at 974–975, and after considering the evidence submitted by the parties, the District Court concluded that the Corps had complied with NEPA, *Atchison V*, *supra*, 480 F.Supp. at 993–1001. We agree with this determination.

A. *Reviewability of Claims under NEPA*

Appellant AIMR suggests that the question whether the Corps has complied with NEPA is insulated from review. It makes two closely related arguments. The first pertains only to the claims of the environmental and railroad appellants that the FEIS is deficient. AIMR suggests that the FEIS, like the pre-authorization cost-benefit analysis, was prepared solely for the benefit of Congress. Thus, once Congress reviewed the project and decided that authorization should be granted, judicial review is unnecessary and intrusive. The second argument applies to both the FEIS and the Section 101 claims. AIMR suggests that Congress repealed NEPA by implication when it passed the authorizing legislation. After carefully reviewing the evidence on environmental impacts, Congress decided that construction should begin immediately. Judicial review to determine compliance with NEPA would be inconsistent with this decision. We believe that both of these arguments are without merit.

With respect to the first argument, we do not believe that the FEIS should be viewed simply as a legislative aid. Unlike the pre-authorization cost-benefit analysis, the Corps' environmental impact statements are not prepared solely for the benefit of Congress. Section 102(2)(C) of

NEPA establishes the environmental impact statement requirement for proposals for legislation in part to ensure that the public has an opportunity to participate meaningfully in decisionmaking at the administrative and legislative levels. *See, e.g., Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1281 (9th Cir. 1974); *Silva v. Lynn*, 482 F.2d 1281, 1285 (1st Cir. 1973); *Atchison IV*, *supra*, 480 F.Supp. at 774–775; *see also Atchison III*, *supra*, 459 F.Supp. at 726–730.[47] Thus the argument that supported dismissal of appellants' claims that the pre-authorization cost-benefit analysis failed to comply with the Water Resources Planning Act, various other statutes, the Water Resources Council *Principles and Standards*, and the Corps' cost-benefit regulations, does not by itself justify dismissal of claims that the Corps' FEIS failed to comply with NEPA.

AIMR's claim that Congress impliedly repealed NEPA when it enacted P.L. 95-502 deserves somewhat more discussion. To support its argument AIMR notes that Congress gave considerable attention to the environmental claims raised by the appellants and concluded that they were without merit:

> [T]he environmental impact statements have been reviewed very carefully by the Committee * * *. This final environmental impact statement setting forth the impacts of a single 1200 foot lock and new dam is considered by the Committee to provide adequate information for Congress to make its decision with respect to the recommended project. * * *

H.R. Rep. No. 95-545, *supra*, at 9. The Committee then concluded that "[t]he impact of the single lock proposal will

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[47] Our decision that the Corps' FEIS is not insulated from review is consistent with the District Court's ruling in *Atchison III*, *supra* note 1, 459 F.Supp. at 727, that appellants possessed standing to enforce NEPA's requirement that an environmental impact statement accompany proposals for legislation.

be minor." *Id.* at 18. AIMR also points out that although P.L. 95-502 authorizes immediate construction of the new Locks and Dam 26,[48] it prohibits further expansion of the waterways system until a study of the environmental and economic effects of this expansion has been completed. AIMR suggests this provision shows that Congress intended to exempt the Locks and Dam 26 project from any further environmental studies. In effect, argues AIMR, Congress reached a compromise between the environmentalists and the proponents of waterways development. *See* brief for AIMR at 13-14.[49] The court should not now tamper with this compromise by taking steps to determine whether the Corps has complied with NEPA.

The Supreme Court has stated that repeal by implication is disfavored. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), it confronted the argument that Congress had impliedly repealed the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (1976), when it appropriated funds for construction of Tellico Dam even though it knew this project would destroy the habitat of an endangered species of fish, the snail darter. The Court rejected this claim, stating that to find Congress had repealed the Endangered Species

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[48]The Act itself does not provide that construction must begin "immediately." AIMR points to evidence in the legislative history that supports its claim that construction was to commence as soon as possible. *See* 124 Cong. Rec. S18049-S18051 (daily ed. Oct. 10, 1979) (statements of Senators Danforth, Eagleton, Stevenson, and Percy); *id.* at H12696-H12698 (daily ed. Oct. 13, 1978) (statements of Representatives Johnson and Frenzel).

[49]AIMR suggests that a third group, the railroad industry, was also a party to this compromise. P.L. 95-502 establishes a user charge on the inland waterways in order to recover a portion of the public investment in the system. *See* P.L. 95-502, 92 STAT. 1695. AIMR suggests that this was a concession made to the railroad interests in return for their acquiescence in immediate construction of a new facility at Locks and Dam 26. Brief for AIMR at 13-14.

Act by passing an appropriations measure would do violence to "'the cardinal rule . . . that repeals by implication are not favored.'" *Id.* at 189, *quoting Morton v. Mancari*, 417 U.S. 535, 549 (1974) (ellipsis in original). As the Supreme Court has stated elsewhere, "Only a clear repugnancy between the old law and the new results in the former giving way * * *." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 457 (1945). In the absence of some affirmative showing of an intention to repeal, the only permissible justification for finding repeal by implication is when the earlier and later statutes are irreconcilable. *Morton v. Mancari*, *supra*, 417 U.S. at 550.

This court has applied the principles set forth by the Supreme Court to hold that an appropriations bill will not operate to relieve an agency from compliance with NEPA. *See Realty Income Trust v. Eckerd*, *supra*, 564 F.2d at 458 n.38; *see also Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 785–786 (D.C. Cir. 1971); *National Audubon Society v. Andrus*, 442 F.Supp. 42, 45–47 (D. D.C. 1977).[80] These decisions do not directly control the result in this case, however; P.L. 95–502 is not an appropriations measure, but substantive legislation authorizing a specific project. Other courts have found repeal by implication in cases involving substantive legislation. In *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978), the Fifth Circuit ruled that a statute giving the Forest Service au-

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[80] *But see American Fed'n of Gov't Employees v. Campbell*, ___ F.2d ___, ___ (D.C. Cir. No. 79–2024, decided Dec. 18, 1980) (slip op. at 7–9). In *AFGE* this court held that Congress amended *pro tanto* a substantive act setting wage rates for federal employees when it passed an appropriations bill that placed a cap on pay increases below the level permitted by the act. The court noted that the substantive act was expressly referred to in the limiting appropriations bill. *Id.*, ___ F.2d at ___, slip op. at 8–9. Thus it concluded that *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), was distinguishable.

thority to permit immediate commencement of clearcutting in national forests precluded further inquiry under NEPA. The court reasoned that the legislative history showed that "Congress gave full attention to environmental and economic concerns inherent in managing the nation's renewable timber resources," and "clearly recognized the significant impact of clearcutting in national forests." *Id.* at 209. Thus the authorization provision represents a congressional decision precluding further judicial inquiry. This decision would not be subject to indirect review by requiring the Forest Service to prepare an environmental impact statement. *Id.* at 209–210. *See Kansas ex rel. Stephan v. Adams*, 608 F.2d 681 (10th Cir. 1979) (authorization bill approving termination of certain AMTRAK routes vitiates need for preparation of environmental impact statement examining consequences of route termination).[51]

We recognize that the arguments in favor of repeal by implication will ordinarily be stronger when Congress has passed substantive legislation authorizing a specific project than when it has enacted an appropriations bill. We note, however, that NEPA itself states that all government action must be taken in accordance with the goals set forth in

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[51] Repeals by implication have also been found when statutorily mandated deadlines or an urgent need for haste make compliance with NEPA impossible. *See, e.g., Atlanta Gas Light Co. v. FPC*, 476 F.2d 142, 150 (5th Cir. 1973); *Gulf Oil Corp. v. Simon*, 373 F.Supp. 1102 (D. D.C.), *aff'd*, 502 F.2d 1154 (T.E.C.A. 1974). Compliance with NEPA's environmental impact statement requirement has not been considered necessary when the agency's organic legislation mandates procedures for considering the environment that are "functional equivalents" of the environmental impact statement process. *See, e.g., Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). *See generally* Note, *The Environmental Impact Statement Requirement in Agency Enforcement Adjudication*, 91 HARV. L. REV. 815, 925 (1978).

the Act. 42 U.S.C. § 4332 (1976). Moreover, Congress has shown that it is fully capable of expressing its desire to exempt projects from NEPA. For example, the Trans-Alaska Pipeline Act, Public Law 93–153, provides that "actions * * * shall be taken without further action under the National Environmental Policy Act * * *." Given Congress' clearly expressed desire to ensure that all government actions are taken in accordance with NEPA, and its ability to expressly override the requirements of the Act, we believe that, even when substantive legislation is involved, repeal by implication should be found only in the rarest of circumstances. Absent very strong evidence in the legislative history demonstrating a congressional desire to repeal NEPA, or a direct contradiction between that Act and the new legislation, claims under NEPA should be reviewed. *See Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 785–793 (1976) (clear conflict must be found before NEPA gives way); *Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973); *see generally* Note, *The Environmental Impact Statement Requirement in Agency Enforcement Adjudication*, 91 HARV. L. REV. 815, 825 (1978).

Here we are unable to find evidence in the legislative history conclusively demonstrating a congressional desire to repeal NEPA. It is true that Congress considered the environmental impact of Locks and Dam 26, and that at least some legislators believed that the FEIS was adequate.[52] But as the District Court emphasized, *see Atchison IV*, *supra*, 480 F.Supp. at 975, other members of

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[52] *See* text at note 48 *supra*, *quoting* H.R. Rep. No. 95–545, *supra* note 28, at 9, which states that the Committee believed the environmental impact statement submitted by the Corps was sufficient to permit Congress to make a decision on the project. Of course, the Committee's view that the FEIS was adequate does not necessarily imply an intention to insulate the FEIS from further judicial review.

Congress believed that the commands of NEPA would continue to apply.

> One, with respect to the court case of Judge Richey, that case has basically two components or two hurdles that need to be surmounted. One was the lack of authorization of locks and dam 26 and two was the adequacy of the environmental impact statement on locks and dam 26.
>
> The bill at least clears the initial hurdle, that is, a lack of authorization of the facility. The Department of Transportation has in addition said that it will do all it can to expedite the decision on the second hurdle. So I believe that at least we have taken a step in the right direction.

124 Cong. Rec. S18050 (daily ed. Oct. 10, 1978) (statement of Senator Schmitt). *See also* 123 Cong. Rec. S10477 (daily ed. June 22, 1977) (statement of Senator Nelson); 124 Cong. Rec. H2700 (daily ed. Oct. 13, 1978) (statement of Representative Edgar); *id.* S6603 (daily ed. May 1, 1978) (statement of Senator Long). We are also unable to conclude that NEPA and P.L. 95-502 are directly contradictory. The fact that Congress did not require further environmental or economic studies of the Locks and Dam 26 project is not irreconcilable with our conclusion that judicial review of appellants' NEPA claims should be available.[53]

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[53] It is true that several legislators expressed a desire that the replacement project begin immediately, *see* note 47 *supra*. But this evidence is not sufficient to justify finding a repeal. *Cf. Gulf Oil Corp. v. Simon*, *supra* note 50 (statutorily mandated deadline would have made compliance with NEPA's environmental impact statement requirement impossible).

The Fifth Circuit's decision in *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978), can be distinguished. In that case Congress clearly wanted clearcutting to begin immediately. 573 F.2d at 209-210. The decision not to require an environmental impact statement was limited to clearcutting under interim guidelines,

B. *Adequacy of Record for Review*

The appellants claim that the administrative record fails to include information vital to an evaluation of the NEPA claims. They argue that the Corps has failed to disclose the data, methodology, and calculations it used in preparing its cost-benefit analysis. As we noted earlier, *see* Part II *supra*, and explain in more detail below, *see* Part IV *infra*, the cost-benefit analysis is relevant because the Corps relies in part on it to conclude that the project could be justified under NEPA. *See, e.g.*, FEIS Vol. 2 at 1.[54] Like the District Court, we find that appellants' claims regarding the adequacy of the record are without merit.

Appellants are clearly correct in suggesting that the administrative record must disclose the studies and data used in compiling environmental impact statements. Moreover, any methodologies relied upon should be carefully described. The impact statement must be "sufficient to enable those who did not have a part in its compilation to understand and consider meaningfully the factors involved." *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1136 (5th Cir. 1974). *See* 40 C.F.R. §§ 1502.23–1502.24 (1980) (NEPA regulations requiring disclosure).[55] *See generally* W. RODGERS,

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pending development of permanent forest management plans. The court held that an environmental impact statement would have to be prepared for the permanent management plans. *Id.* at 206–208.

[54] *See also* Part IV–G *infra* (discussing appellants' claim that cost-benefit analysis was defective).

[55] The NEPA regulations provide that agencies "shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement." 40 C.F.R. § 1502.24 (1980). They also state that "[i]f a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by refer-

ENVIRONMENTAL LAW 725–728 (1977). NEPA clearly contemplates that the public should have an opportunity to challenge the adequacy of environmental impact statements. *See Sierra Club v. Morton*, *supra*. But without full disclosure the public would not be able to make independent judgments about the agency's action. Moreover, disclosure is necessary if the courts are to review environmental impact statements for compliance with NEPA. Additional support for the disclosure requirement is provided by the Administrative Procedure Act, 5 U.S.C. § 704 (1976). An environmental impact statement is a "final agency action" within the meaning of the APA, *id.* Under the APA judicial review of final agency action must "be based on the full administrative record that was before the [decisionmaker] at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra*, 401 U.S. at 420.[56]

We find no basis, however, for the appellants' contention that the Corps has failed to disclose the methodology on which it relied in computing the cost-benefit ratio; this

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ence or appended to the statement as an aid in evaluating the environmental consequences." *Id.* § 1502.23.

[56] By referring to the APA and the Supreme Court's decision in *Overton Park*, we do not mean to imply that judicial review of an FEIS should be limited to the contents of the original administrative record, or that the District Court erred when it decided to permit introduction of new evidence. *See Atchison III*, *supra* note 1, 459 F.Supp. at 192–193. Suits challenging environmental impact statements seek to ensure compliance with a statute other than the APA. The reviewing court must ensure that the agency decision adequately discusses environmental effects and alternatives. Allegations that an impact statement fails to consider serious environmental consequences or realistic alternatives raise issues sufficiently important to warrant introduction of new evidence in the District Court. *See id.; County of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1384–1385 (2d Cir. 1977), *cert. denied*, 435 U.S. 519 (1978).

claim is disingenuous. A step-by-step description of the methodology used by the Corps is contained in the FER, *see* FER Vol. 1 at 7–1 to 7–12; in the SED, *see* SED Vol. 1 at 7–1 to 7–20; and in the GDM Supp. No. 2, *see* GDM Supp. No. 2 at 20–1 to 20–20. Moreover, Corps economists apparently described the methodological basis of the Corps' studies to appellants and their technical experts. *See* Eickhorst Affidavit at 2–3, Appellees' Opposition to Appellants' Motion for Stay.[57] In fact, they helped appellants adapt the Corps' computer programs for use on appellants' computer system. *Id.*[58] Appellants' economic expert, Dr. Robert Haveman, used the adapted programs to produce alternative forecasts of the impact of the Locks and Dam 26 proposal. Haveman Testimony at JA 1018–1029, 1034, 1096–1100. His testimony at trial revealed a thorough understanding of the Corps' methodology.

We also find that the Corps fulfilled any obligation it had to disclose the raw data on which its cost-benefit analysis was based. Appellants claim, in particular, that the Corps has never released the data it used to determine the rate savings shippers would receive if the capacity of Locks and Dam 26 were expanded. The rate savings figures are quite important; the Corps' determination that rate savings would be significant strongly influenced its conclusion that the economic benefits of the project exceeded its cost. *See*,

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[57] Appellants have not produced any evidence rebutting the contents of this affidavit.

[58] In addition to their claims concerning the Corps' methodology, appellants suggest that the Corps failed to disclose the "calculations" it made before concluding that net economic benefits were positive. But since the Corps did disclose its methodology, we are not convinced that it should also be required to produce its arithmetic for appellants. In any event, appellants had access to the computer program the Corps used to perform its calculations. The Corps certainly had no obligation to reproduce on paper all of the calculations performed by the computer.

e.g., FER Vol. 1 at 5–8 (Table 5–3).[59] Rate savings were determined by comparing the actual cost of shipping by barge with the rate on an alternative mode. The difference between the two was used to calculate the amount shippers would save if the capacity of Locks and Dam 26 was expanded and they could ship by barge goods currently being shipped by other modes.[60] The underlying data were gathered by Charles R. Donley & Associates, a private consulting firm hired by the Corps. But as the District Court explained, *Atchison V*, *supra*, almost all of this information is already available to appellants. They possess data on the rates on alternative modes of transportation.[61] They also know the tonnage, the commodity, and the origin, destination, and average rate for each of the 231 barge movements examined in compiling the rate data. *See* FER Vol. 3 App. I & J. In fact, appellants have admitted that the only data they do not possess are the identities of the barge carriers interviewed by Donley & Associates. Haveman Testimony at JA 1084–1092.[62] The consulting firm never released

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[59] Rate savings and delay reductions were the primary benefits considered by the Corps in performing its analysis. *See* FER Vol. 1 at 7–1 to 7–12; SED Vol. 7 at 7–1 to 7–20; GDM Supp. No. 2 at 20–1 to 20–20.

[60] For a more complete description of the Corps' techniques, *see id.* A complex supply-demand analysis was used to determine net economic benefits.

[61] The alternative modes of transportation are primarily railroads. *See* FER Vol. 1 at 7–1. Appellants do not suggest that they do not have access to information on railroad rates.

[62] Dr. Haveman testified: "I have no indication as to the shippers or the barge-line carriers on which that shipment moved; nor do I have any indication as to the method by which the person who put the number on the paper obtained the number." Haveman Testimony at JA 1087.

Appellants' suggestion that the Corps failed to disclose the "method" by which the barge rate numbers were obtained lacks merit. *See* reply brief for appellants at 41–42. Donley & Associates'

these names to the Corps, claiming that they were confidential proprietary information and therefore privileged. Chimento Deposition at JA 2942-2943, 3008–3011, 3078.

The District Court upheld the claim of privilege. We are persuaded by its reasoning. The information provided by the unidentified barge carriers was derived primarily from long-term shipping contracts. FER Vol. 3 App. 1, attachment I–16. Thus requiring Donley & Associates to disclose the identities of the carriers might harm the competitive positions of those firms. Disclosure would also undermine Donley's ability to carry out its business; it would no longer be able to obtain information from carriers. *See* Chimento Deposition at JA 2942–2943, 3008–3011, 3078. It seems clear that this is legitimate proprietary information, and that a privilege should apply. It is well established that an agency may claim a privilege with respect to documents that may have influenced a particular decision. *See Nat'l Courier Ass'n v. Board of Governors of Federal Reserve System*, 516 F.2d 1229, 1241–1242 (D.C. Cir. 1975).[63]

We would not uphold the claim of privilege if failure to disclose the identities of the barge carriers would substantially impair the rights of appellants. We do not believe, however, that any such impairment will occur. Appellants argue that the identities of the barge carriers are crucial if they are to challenge the accuracy of the barge

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methodology was described in detail. *See* Chimento Deposition at JA 2922–3088

[63] Appellants attempt to bolster their argument by citing *United States Lines, Inc. v. FMC*, 584 F.2d 519 (D.C. Cir. 1978). In that case the FMC relied on unspecified "data reposing in the files of the Commission" to make certain critical findings. It refused even to describe this information. The court held that the FMC was required to disclose the basis for its decision. The situation that confronts us here is easily distinguishable. The Corps has released the information on which it relied; again, the only missing data are the identities of the carriers.

rate data. They suggest that the carriers would have had an incentive to understate barge rates because they would have wanted the project to be approved. Given this possibility of distortion, appellants claim they should be given an opportunity to cross-examine the carriers. *See* reply brief for appellants at 41 n.9; Haveman Testimony at JA 1087, 1089–1090. But two independent verification studies establish the reliability of the Donley & Associates data. At the Corps' request the Tennessee Valley Authority independently obtained rate information and found little deviation from the Donley study.[64] Second, the St. Louis District Engineer conducted a barge rate verification survey and also found little deviation.[65] Moreover, if they had so desired the appellant railroads could have conducted their own verification study. Because they are competitors of the barge companies, railroads closely monitor current barge rates. *See* Senate Hearings 1977 at 781, 786–787; Haveman Testimony at JA 1094–1095.

C. *Scope of Review*

Before analyzing appellants' specific objections, we will briefly discuss the standard of review to be applied in determining whether an agency has complied with NEPA. Appellants claim that the District Court should have done more than simply ensure that the agency's conclusions were

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[64]TVA independently obtained rate information on the same 231 movements used by the Corps. TVA found that rate savings on 84% of the movements were within 5% of the Donley rates. Only 1% of the movements had a margin of error over 20%. *See* SED Vol. 2, App. 1, attachment I. Because of these differences the TVA study produced a lower level of benefits than did the Donley study. However, the benefit-cost ratio remained greater than unity. *See* SED Vol. 1 at S–5.

[65]*See* SED Vol. 2, App. 1, attachment 1. The rates obtained by the St. Louis District also led to a lower level of benefits than did the rates obtained by Donley & Associates. Again, however, the benefit-cost ratio was greater than unity. *See* SED Vol. 1 at S–5.

based on the relevant factors and were not arbitrary and capricious. Instead, the court should have resolved any disputed factual issues *de novo* and by a preponderance of the evidence. Brief for appellants at 14–26. This argument is clearly incorrect; such intrusive review would be directly contrary to well settled principles.

In reviewing compliance with NEPA, courts must first determine whether the agency has complied with its "procedural" obligations under Section 102, which establishes the environmental impact statement requirement: it must ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a "hard look" at environmental factors, and to make a reasoned decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Sierra Club v. Adams*, 578 F.2d 389, 393–396 (D.C. Cir. 1978). Second, reviewing courts must determine whether the agency has complied with its "substantive" obligations under Section 101; it must ensure that the agency's conclusions are not irrational or otherwise "arbitrary and capricious."[66] *See Calvert Cliffs' Coordinating Committee, Inc. v.* AEC, 449 F.2d 1109 (D.C. Cir. 1971); *County of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1383 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 226–228 (1980).[67] In making these determinations the

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[66] The courts frequently classify agency obligations under NEPA as either "procedural" or "substantive." The distinction is not perfect, but it has proven to be useful. *See Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); *see generally* W. RODGERS, ENVIRONMENTAL LAW §§ 7.3–7.5 (1977).

[67] The Government suggests that *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980), bars substantive review of agency decisions under NEPA. *See* brief for appellees at 46. But *Strycker's Bay* holds only that a reviewing court may not substitute its own judgment for that of the agency so long as

courts must be governed by a "rule of reason." *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 827 (D.C. Cir. 1977). They should not substitute their judgment for that of the agency. *Kleppe v. Sierra Club*, *supra*, 427 U.S. at 410 n.21. In particular, they should not attempt to resolve conflicting scientific opinions. *County of Suffolk v. Sec'y of Interior*, *supra*, 562 F.2d at 1383. So long as the agency's conclusions have a substantial basis in fact, the mandate of NEPA has been satisfied.

D. *Consideration of Alternatives*

NEPA requires agencies to include in their environmental impact statements a discussion of "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii) (1976). Appellants contend that the FEIS prepared by the Corps fails adequately to address three alternatives to the proposed Locks and Dam 26 project: (1) rehabilitation of the existing structure; (2) investment in alternative transportation modes; and (3) improved congestion control. The District Court correctly found that these contentions lack merit. *See Atchison V*, *supra*, 480 F.Supp. at 995–996.[68]

When Congress has enacted legislation approving a specific project, the implementing agency's obligation to dis-

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the agency's decision is not arbitrary and capricious. *Id.* at 226–228.

[68] Appellants do not contend that the FEIS contains no discussion of alternatives. In fact, the statement considers a variety of alternatives, including (1) no action; (2) rehabilitation; (3) new dam with one 1,200-foot lock and one 600-foot lock; (4) new dam with two 1,200-foot locks; and (5) use of alternative modes of transportation. *See* FEIS Vol. 1 at 73–81. The Corps also considered these alternatives in performing its preauthorization economic analysis. *See generally* FER Vol. 1; SED Vol. 1. Indeed it was required to do so by the Water Resources Council *Principles and Standards*, *see Principles and Standards*, *supra* note 7, at SA 191, and by its own cost-benefit regulations, 33 C.F.R. Parts 290–295 (1979).

cuss alternatives in its environmental impact statement is relatively narrow. It is true that the "rule of reason" still applies. But as we explained in *Sierra Club v. Adams*, *supra*, 578 F.2d at 396:

> While subsequent congressional action does not vitiate the need for an environmental impact statement or a discussion of alternatives (unless explicitly stated in the statute), such action does have a bearing on what is considered a reasonable alternative, and a reasonable discussion. * * *

In *Sierra Club v. Adams* the appellants argued that the Federal Highway Administration had failed to give sufficient attention to alternatives to the construction of a highway project. We approved "somewhat brief" discussions of those alternatives, "in view of the fact that Congress has authorized United States assistance in constructing a *highway* * * *." *Id.* (emphasis in original).

In this case extensive discussion of the rehabilitation alternative listed by the appellants was made unnecessary and would be inconsistent with the congressional decision to approve replacement of Locks and Dam 26. In passing P.L. 95-502 Congress was clearly motivated by a desire to increase the capacity of Locks and Dam 26. *See* P.L. 95-502 § 102(a); *see also* H.R. Rep. No. 95-545, *supra*, at 10-11; S. Rep. No. 95-215, *supra*, at 4-5, 14-15, 16-17. Moreover, in Section 101(j) of the statute Congress explicitly stated that the new structure should be designed "to provide for possible future expansion" of the entire inland waterways system. Rehabilitation would not fulfill this congressional mandate. P.L. 95-502 § 101(j).[69] But even if

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[69] Appellants argue that passage of P.L. 95-502 cannot be viewed as a mandate for construction of a new facility at Locks and Dam 26 since, even after congressional authorization, the Corps was required to perform a *de novo* evaluation of the project and decide whether construction was warranted. *See* brief for appellants at 97-110. But as we explained in Part III-A *supra*, appellants mischaracterize the nature of the Corps' post-authorization decisionmaking.

there was no conflict with the congressional mandate, we believe the Corps took a sufficiently "hard look" at the rehabilitation alternative. Rehabilitation is discussed at length in the FEIS, *see* FEIS Vol. 1 at 70–71, 74–78, and in the RDSEIS, *see* RDSEIS Vol. 1 at xviii, 6–6 to 6–10, 6–52 to 6–78, which was an appendix to the FEIS. *See generally* FER Vol. 1 at JA 2066–2067, 2071 (economic analysis of rehabilitation).[70] The appellant railroads' views on rehabilitation are printed verbatim in the FEIS and are responded to by the Corps. FEIS Vol. 2 at 274–279, 286–290. The FEIS also contains other conflicting viewpoints on rehabilitation. FEIS Vol. 2 at 104–106, 133–136, 142–145, 162–181, 186–188, 213–219, 223–224, 233–236, 239–240, 269, 451–453, 469–701. The Corps determined that massive rehabilitation would be necessary to ensure that Locks and Dam 26 remained safe over the long run. The costs of rehabilitation without interrupting traffic were believed to be comparable to or greater than the costs of replacement. FEIS Vol. 1 at ii, 75, 77. Moreover, the Corps found an unacceptably high risk that rehabilitation would encounter insoluble engineering problems and that the construction process itself might damage the facility. The Corps also reasoned that a rehabilitated facility would never be as structurally sound as a new facility. RDSEIS Vol. 1 at 6–8 to 6–10.

At trial appellants disputed the Corps' resolution of the rehabilitation issue. They presented an engineering expert, Mr. William A. Wahler, who questioned the Corps' judgment that the present structure was unsafe and that rehabilitation was not a prudent alternative. He proposed various rehabilitation schemes that he claimed would be safe and economical. Wahler Testimony at JA 1337–1473. Appellees responded by producing their own engineering expert, Mr. Homer Willis, who addressed each of the claims

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[70]The FER was also an appendix to the FEIS. *See* FEIS Vol. 1 at 1.

made by Mr. Wahler. Willis Testimony at JA 1560–1615.[71] The District Court began its discussion of this evidence by stating that it should not resolve conflicting scientific judgments. It then concluded that appellants' evidence did not demonstrate that the Corps had failed to give adequate attention to the rehabilitation alternative, or that it had acted arbitrarily in rejecting that alternative; the Willis testimony and the discussion in the FEIS showed that the Corps had a reasonable basis for its decision. *Atchison V*, *supra*, 480 F.Supp. at 995–996. We see no reason to disturb this conclusion.

Appellants also suggest that the Corps failed to give adequate consideration to the possibility of increasing investment in an alternative mode of transportation—specifically, railroads. In our view, the Corps fulfilled its obligation to consider this alternative. Again, extensive discussion was not necessary since Congress expressed a

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[71] Wahler testified that underseepage, voids under the dam caused by erosion of the riverbed, and movement of the dam monoliths were not causes for concern. *See* Wahler Testimony at JA 1410–1414, 1415–1416, 1427. *Cf.* Willis Testimony at JA 1601–1605 (contradicting Wahler). Wahler's rehabilitation plan involved upstream reinforcement of the dam monoliths with rock anchors secured by drilled piles, Wahler Testimony at JA 1939–1946, pumping sand and grout in the voids, *id.* at JA 1415–1416, and repairing and reinforcing the lock walls and floor, *id.* at JA 1454–1455, 1469–1472. He proposed that these repairs be made "in the wet," *id.* at JA 1452-1454, 1461-1464, 1468–1471, as opposed to "in the dry" with coffer dams, id. at JA 1476. He conceded that this technique had never been tested. *Id.* at JA 1473–1475. Willis questioned the wisdom of "in the wet" repairs. Willis Testimony at JA 1609–1615; *see also id.* at JA 1579–1582, 1594–1595, 1605–1606. Another Corps expert noted that the Wahler plan assumed repairs could be performed in the winter when there was "no traffic." Wahler Testimony at JA 1468–1469, 1471–1472. But, in fact, traffic passes through the locks throughout the year. *See* McKinney Testimony at JA 1530–1531.

desire to favor development of water transportation when it passed P.L. 95–502. Despite this limited obligation, the Corps' discussion of investment in railroads is fairly detailed. *See* FEIS Vol. 1 at 76, 77, 80–81; *id.* Vol. 2 at 104–106; RDSEIS Vol. 1 at 6–11 to 6–12, 6–14 to 6–15, 6–93 to 6–134. *See also* FER Vol. 1 at S–3 to S–4, 3–11 to 3–29, 6–71 to 6–105. It noted that a large investment would be needed to expand the capacity of the railroads. *See* FEIS Vol. 2 at 104–106.[72] Even if this investment were not necessary, reliance on railroads would be less desirable from an economic standpoint. *See* FER Vol. 1 at S–14 to S–17. The Corps also pointed out that investment in railroads would have to be accompanied by rehabilitation of Locks and Dam 26; failing to take any action would not solve the safety problem that the existing structure posed. But rehabilitation had already been shown to be undesirable. FEIS Vol. 1 at 71, 76, 77, 80, 81.

Finally, appellants claim that the Corps failed to give adequate attention to methods of controlling congestion at the current structure. They suggest, for example, that imposition of a "congestion toll" would have solved the problem by deterring inefficient tow operators from using the locks. Although congestion controls are examined in the Corps' economic analysis, *see* FER Vol. 1 at 6–159, 6–160; SED Vol. 1 at 6–154 to 6–155, they are not discussed in the FEIS. But congestion controls would not fulfill the congressional mandate to expand the capacity of the waterways system. Moreover, they would not solve the safety problem posed by the existing structure. Finally, as appellants have conceded, the Corps lacks the authority to impose a congestion toll. Haveman Testimony at JA 1107. As the District Court stated, "It would certainly be a waste of agency resources to

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[72] However, in analyzing the railroad alternative the Corps assumed that no additional expansion of capacity would be required. *See* FEIS Vol. 1 at 71, 76, 77, 80–81; *see also* FER Vol. 1 at S–3 to S–4, 3–11 to 3–29, 6–71 to 6–105; SED Vol. 1 at 6–97.

test the efficiency of an alternative which is not only beyond the agency's power, but also incapable of either fully solving the problem at hand or fulfilling the mandate of Congress." *Atchison V*, *supra*, 480 F.Supp. at 996.

E. *Preparation of Programmatic Environmental Impact Statement*

Appellants argue that the Corps should have prepared a "programmatic" environmental impact statement that discussed the authorized project as part of a master plan to deepen the entire system's navigation channel from nine to 12 feet. According to appellants, the new facility is designed so that it can accommodate 12-foot draft traffic. The old structure could only accommodate nine-foot draft traffic. They state that the Corps also plans to deepen channels elsewhere, and that an environmental impact statement discussing the impact of this systemwide deepening must be prepared. The District Court rejected these arguments, finding that there was no secret plan to expand the waterways system, and that a programmatic environmental impact statement was not required. *See Atchison V*, *supra*, 480 F.Supp. at 996–998. Once again, we agree with the District Court's conclusion.

An environmental impact statement must be prepared whenever an agency makes a definite recommendation for federal action. *Andrus v. Sierra Club*, 442 U.S. 347, 350 n.2 (1979); *Kleppe v. Sierra Club*, *supra*, 427 U.S. at 399–403; *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243–1244 (D.C. Cir. 1980). The scope of the environmental impact statement depends on the scope of the proposal actually made. *Kleppe v. Sierra Club*, *supra*, 427 U.S. at 405–410, 410 n.20. Thus, a programmatic statement is appropriate only where the proposal itself is regional or systemic in scope, or where the proposal is one of a series of interrelated proposals that will produce cumulative systemwide effects that can be meaningfully evaluated together. *Id.* at 403–415; *Joseph v. Adams*, 467 F.Supp. 141, 157 (E.D. Mich. 1979). *See also National Wildlife Federation*

v. Appalachian Regional Comm'n, ___ F.2d ___ (D.C. Cir. No. 79-2349, decided March 19, 1981).[73] These criteria have not been met here.

The District Court found, based on all the evidence produced at trial, that there is no pending proposal for a 12-foot channel. *Atchison V, supra*, 480 F.Supp. at 997. The District Court also found that the new facility will have a deeper floor than the existing structure, not so that it can accommodate 12-foot draft traffic, but so that it is more efficient in handling nine-foot draft traffic. *Id.* We find no reason to overturn these findings. They are overwhelmingly supported by the record. FEIS Vol. 1 at 4-5, 14-19; *id.* Vol. 2 at 486; RDSEIS Vol. 1 at 1-30 to 1-35, 1-55 to 1-57, 9-95 to 9-99; *see also* GDM Supp. No. 2 at 9-1 to 9-4; BERH Rep. at V. Appellants have been unable to identify any current proposal to deepen the channel.[74] Moreover, the matter has been

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[73] Even when the proposal is one of a series of closely related proposals, the decision whether to prepare a programmatic impact statement is committed to the agency's discretion. Reviewing courts will interfere with that decision only when it is irrational or has been shown to be arbitrary or capricious. *See Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *National Wildlife Federation v. Appalachian Regional Comm'n*, ___ F.2d ___ (D.C. Cir. No. 79-2349, decided March 19, 1981).

[74] The Corps has studied the feasibility of deepening the Mississippi River-Illinois River Waterway to 12 feet. *See* RDSEIS Vol. 1 at 1-55. In 1973 it issued a preliminary report in which it recommended no further study for a 12-foot channel on the Mississippi River above Grafton, Illinois. The report did recommend continuation of study for a 12-foot channel on the Middle Mississippi and Illinois Rivers from Cairo to Chicago, Illinois. No further study has been initiated, however. *See id.* at 1-56. Certainly the initial study did not culminate in a proposal for systemwide deepening of the channel.

As additional support for their claim that a programmatic impact statement should have been prepared, appellants point to the Corps' Illinois Duplicate Lock Project, which proposed construction of new 1,200-foot locks on the Illinois River. However, although the Corps did prepare a General Design Memorandum

mooted by Congress. Section 101(i) of P.L. 95–502 expressly precludes any project that would expand the capacity of the waterways system until the master development plan required by Section 102(a) has been completed.

F. *Environmental Impact of the Replacement Project*

The heart of every environmental impact statement is its examination of the environmental consequences of the proposed agency action. Appellants claim that the Corps' FEIS fails to assess the systemwide biological impact of either the present barge traffic or the increment in traffic that will be caused if the new Locks and Dam 26 is built.[78] Indeed, they suggest that this case represents "the most blatant disregard of the obligation to investigate, evaluate and balance environmental damage in the history of NEPA * * *." Brief for appellants at 119. This hyperbole lacks any creditable foundation. Like the District Court, we believe the FEIS adequately examines the environmental

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for this project, *see* Illinois Duplicate Lock Project, General Design Memorandum (PX 516), there is no pending proposal to complete the project; completion is precluded by § 101(i) of P.L. 95–502. Appellants also suggest that if the capacity of Locks and Dam 26 is expanded there will be enormous pressure to expand the capacity of locks elsewhere in the navigation system, since existing locks will not be able to absorb the increase in traffic. But this is pure speculation. Appellants have not shown that new facilities at Locks and Dam 26 automatically necessitate expansion of the entire system. Indeed, the Corps has presented evidence showing that, at least on the Illinois River, the existing locks will be able to absorb the increase in traffic attributable to expansion of Locks and Dam 26. *See* Part IV–G *infra*. In the absence of a definite proposal to expand the entire system, we cannot conclude that the Corps should have prepared a broader statement.

[78] Appellants do not challenge the Corps' discussion of local or site-related environmental impacts. These impacts are carefully described in the FEIS. *See* FEIS Vol. 1 at 20–23, 44–53.

impact of the replacement project. *See Atchison V*, *supra*, 480 F.Supp. at 998–999.

As the District Court explained, *see id.* at 998, determining the systemic environmental impact of increased river usage is a two-step process. First, it is necessary to measure the physical effects of the increase in barge traffic. Then, once the physical effects are known, the biological impact can be determined. At least in a very general way, the physical and biological impacts of tow traffic are well understood. Barges stir up and resuspend bottom sediment; a plume of resuspended sediment may stretch behind a tow as far as two or three miles. Once the sediment has been resuspended, it may be carried by the main channel flow into backwater areas of the Illinois and Mississippi Rivers. *Id.*[76] Increased river turbidity and sedimentation can interfere with fish habitats and upset the ecology of backwater areas. *See generally* Claflin Testimony at JA 1174; Sparks Testimony at JA 1275.

In order to measure more carefully the physical effects of increased tow traffic, the Corps conducted four sedimentation studies before issuing its FEIS.[77] In these studies it

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[76]Tow traffic also contributes to erosion of river banks. *See* FEIS Vol. 1 at 25. The Corps concluded that on the Illinois River bank erosion attributable to the increase in Locks and Dam 26 traffic would be insignificant. Erosion is more likely on the Mississippi, but its banks are already protected by Corps channel maintenance programs. *See* RDSEIS Vol. 1 at 2–33 to 2–35.

Other possible environmental problems discussed by the Corps in its FEIS include: (1) accidental spills; (2) air pollution from tugs; (3) disturbance of recreation usage of the river as tugs pass; (4) disturbance of wildlife that may be frightened by tugs; and (5) "secondary environmental land use impacts," for example, increased pressure to convert wetlands caused by an increase in terminal facilities. *See* FEIS Vol. 1 at 24, 61–25; *see generally* RDSEIS Vol. 1 at 4–14 to 4–111, 5–1 to 5–12.

[77]The "Karaki Study" (infra-red photography), RDSEIS Vol. 2, App. A; the "Johnson Study" (sampling of turbidity during

assumed that the 18 percent expansion in the capacity of Locks and Dam 26 resulting from construction of the replacement facility would lead to roughly six more tows per day. *See* FEIS Vol. 1 at ii, vi, 71–73; RDSEIS Vol. 7 at 6–178 to 6–179. The Corps concluded that there would be statistically significant but minor increases in the turbidity level on the Upper Mississippi above Locks and Dam 26. FEIS Vol. 1 at 55; RDSEIS Vol. 1 at 4–14 to 4–23, 5–1 to 5–2. The impact on the Mississippi River below Locks and Dam 26 would be insignificant; turbidity levels on that stretch of the river were already extremely high. FEIS Vol. 1 at 55–56; RDSEIS Vol. 1 at 4–14 to 4–20, 5–1 to 5–2. Increases in barge traffic would have virtually no effect on turbidity levels on the Illinois River during periods of high river flow. Turbidity levels would be increased during periods of low river flow, but not above the levels present during high flow. FEIS Vol. 1 at 56–58; RDSEIS Vol. 1 at 4–14 to 4–23, 5–1 to 5–2. The studies concluded that backwater sedimentation attributable to the increases in turbidity would be insignificant. They found that (1) very large amounts of sediment are deposited in backwater areas by natural processes; (2) the amount of sedimentation caused by existing tow traffic is very slight in relation to these natural processes; and (3) the amount of sedimentation that would be caused by a several-tow-per-day traffic increase would not be substantial. FEIS Vol. 1 at vi, 23–24, 26–27, 34–35, 37, 40–41, 53–60, 62, 80; RDSEIS Vol. 1 at xv, xvii, 2–31 to 2–36, 2–333, 4–55 to 4–72, 8–2 to 8–3. As the FEIS states, increased tow traffic "cannot be blamed for the continuing, processional loss of backwater areas." FEIS Vol. 1 at 54.[78]

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tow passages) (DX 83); the "Link Study" (remote sensing and image enhancement) (DX 84); and the "St. Louis District Study" (sampling of turbidity during tow passages), RDSEIS Vol. 1 at 4–55 to 4–72.

[78] At trial a Corps expert concluded on the basis of the Johnson Study, *see* note 77 *supra*, and his own work that ex-

Having concluded that the physical impact of the replacement project would be minor, the Corps chose not to attempt to quantify the biological impact of the project. The Corps conceded that it would have been possible to determine the biological impact stemming from the slight increase in backwater sedimentation and turbidity. But it argued that such a study would be unjustified since it would take from five to ten years and would cost at least one million dollars.[79] However, the Corps did commission a brief examination of the environmental impact on the ecosystem of the Illinois River. This study, which relied on currently available data, was unable to conclude that the biological impact would be significant. *See* DSEIS Vol. 3, App. J (DX 46); *see also* RDSEIS Vol. 2 at 9–89 to 9–94. Moreover, the FEIS does set forth potential biological problems. It explains that increased turbidity may interfere with fish, waterfowl, and various aquatic organisms, and that increased sedimentation can alter the ecology of backwater areas.[80] It also carefully describes the gaps and uncertainties in the

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isting tow traffic was responsible for no more than 4 or 5% of sediment deposited in backwaters of the Upper Mississippi, and only about 6% of backwater sedimentation on the Illinois. Simons Testimony at JA 1703–1704.

[79] One of appellants' expert biologists, Dr. Claflin, suggested that such a study would take three years and cost roughly a million dollars. Claflin Testimony at JA 1265. The Corps' expert hydrologist, Dr. Simons, estimated that a field study would cost between two and 10 million dollars and would require five to 10 years and the services of 10 scientists. Simons Testimony at JA 1715–1717.

[80] The Corps noted, in particular, that on the Upper Mississippi River the concentration of suspended solids would remain below the level that the Environmental Protection Agency has said will interfere with maintenance of good fisheries. It also pointed out that on the Illinois River, which is apparently quite polluted, concentrations already exceed dangerous levels. *See* FEIS Vol. 1 at 59.

Corps' approach. FEIS Vol. 1 at vi, 59–63; *see also id.* at 24–43; RDSEIS Vol. 7 at 4–55 to 4–107.

The appellants claim that the Corps should have made an effort to quantify the biological impact of the Locks and Dam 26 project. More precisely, they argue that the Corps should have delayed construction of the new facility for five or ten years and conducted a multimillion dollar environmental study. *See* Claflin Testimony at JA 1761–1771. But appellants have failed successfully to attack the Corps' conclusion that the physical impact of the project would be minor. They produced two expert biologists who stated that the physical effects might be significant. *See id.* at JA 1198-1199, 1261–1271; Sparks Testimony at JA 1288–1290, 1303–1307. But they were unable to identify any other experts who supported their position. *See, e.g.*, Claflin Testimony at JA 1262. An independent sedimentation expert supported the Corps at trial. *See* Simons Testimony at JA 1686–1692, 1709–1711, 1719.

Particularly in light of the fact that reviewing courts should not resolve conflicting scientific opinions, we cannot conclude that the Corps' determination that the physical effects would be minor lacked a substantial basis. And given the Corps' conclusion that the physical effects would be minor, its decision not to conduct a major biological study was clearly justified. NEPA does not require federal agencies to examine every possible environmental consequence. Detailed analysis is required only where impacts are likely. *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 799 (D.C. Cir. 1975). Where adverse environmental impacts are not likely, expensive and time-consuming studies are not necessary. So long as the environmental impact statement identifies areas of uncertainty, the agency has fulfilled its mission under NEPA. As the Ninth Circuit stated in *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280 (9th Cir. 1973), "If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects

were known, it is doubtful that any project could ever be initiated." Here the Corps explained its conclusions and identified areas of uncertainty. Appellants' claim that the FEIS did not adequately address potential environmental problems must fail.

G. *Balancing of Environmental and Economic Costs and Benefits*

Under Section 101 of NEPA, 42 U.S.C. § 4331 (1976), agencies must consider whether the environmental costs of a project outweigh its economic and technical benefits. "A rather finely-tuned and 'systematic' balancing analysis" should be performed. *Calvert Cliffs' Coordinating Committee v. AEC*, *supra*, 449 F.2d at 1113. The appellants claim that the Corps did not fulfill its substantive duties under Section 101, because its analysis of the economic costs and benefits of the replacement project was flawed. In particular, they claim that the Corps: (1) failed properly to quantify congestion on the Illinois River; (2) omitted the costs of systemwide maintenance; and (3) failed to treat certain railroad losses as costs. According to appellants, if the Corps had included these economic costs in its analysis, it might have been less willing to conclude that the economic benefits of the replacement project outweighed any adverse environmental impact. After noting that a substantive decision should not be reversed unless it can be shown that the balance of costs and benefits struck was arbitrary or clearly gave insufficient weight to environmental values, *Atchison V*, *supra*, 480 F.Supp. at 999 (*citing Calvert Cliffs'*, *supra*), the District Court reviewed appellants' claims and found that they lacked merit. *Id.* at 999-1001. We see no reason to overturn this finding. We note, at the outset, that appellants' contention that the Corps failed to give sufficient weight to environmental values would not be very persuasive even if the Corps did overstate the economic benefits of the project. As we held above, *see* Part IV-F *supra*, the Corps reasonably concluded that the adverse environmental consequences of the project would be

minimal. Under the circumstances, it is very difficult to argue that the Corps violated the substantive mandate of NEPA. But in any event we do not believe that the flaws identified by appellants support a finding that the cost-benefit analysis was arbitrary.

First, appellants argue that the Corps failed to recognize that if the capacity of Locks and Dam 26 is expanded, any benefits obtained by alleviating delays at that facility will be offset by increased delays on the Illinois River; that is, it failed to understand that the construction project will do no more than move the bottleneck upstream. This argument is not persuasive. It is clear that the Corps did give some attention to the possibility that expansion of Locks and Dam 26 might cause delays in the rest of the system. It computed its cost-benefit ratio by developing a supply-and-demand model that enabled it to predict how a change in capacity at Locks and Dam 26 would affect usage of the entire waterways system. The possibility that an 18 percent expansion of capacity at Locks and Dam 26 would result in bottlenecks elsewhere in the system, and in particular on the Illinois River, was considered. *See* FER Vol. 1 at 5–1 to 5–5; SED Vol. 1 at 5–1 to 5–5; Daniel Testimony at JA 1778–1783.[81] The Corps concluded that expansion of Locks and Dam 26 would not substantially increase delay costs on the Illinois River. *See, e.g.*, FEIS Vol. 1 at 5 ("no system improvements are needed to move [the new traffic]; therefore, there are no system costs attributable to the proposal"); *see generally* FER Vol. 1; SED Vol. 1.

In an attempt to bolster their argument, appellants contend that the Corps has underestimated the growth of local traffic on the Illinois River—traffic that will not pass

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[81] The Corps identified potential "constraint points" on the waterways system. The lock at LaGrange, Illinois was treated as the representative constraint point for the Illinois River. *See* FER Vol. 1 at 5–1 to 5–5; SED Vol. 1 at 5–1 to 5–5; Daniel Testimony at JA 1778–1783.

through Locks and Dam 26. They point to data in a General Design Memorandum for the Corps' Illinois River Duplicate Locks Project ("Illinois Duplicate Locks GDM") (PX 519), Tables B-26 and B-32, which they claim show that local coal and sludge traffic will grow substantially over the next 50 years. According to appellants, the existing Illinois locks will not have the capacity to handle both this traffic and the projected increase in long-haul traffic passing through Locks and Dam 26. But as the District Court carefully explains, *see Atchison V*, *supra*, 480 F.Supp. at 1000, appellants misrepresent the contents of the Illinois Duplicate Locks GDM. The figures relied on by appellants were computed without regard to the capacity of the Illinois River.[82] The memorandum indicates that unless the capacity of the Illinois River is drastically expanded as a result of construction of duplicate locks, local coal and sludge traffic will remain at current levels. *See* Illinois Duplicate Locks GDM at Table B-38.[83] Recent data support this view, showing that coal and sludge traffic on the Illinois has been stagnating for several years. *See* Daniel Testimony at JA 1782, 1873.

Appellants complain that the Corps failed to recognize losses that will be incurred by the railroads if the replacement facility is built. As appellants concede, the railroads will not lose any of their current traffic if the project goes forward. Their share of traffic will not increase, however; they will not receive roughly $135 million dollars in future revenues they have been projected to receive if the new lock is not constructed. FEIS Vol. 1 at 67–68; FER Vol. 1 at 6–98; *see also* FEIS Vol. 1 at 76–81. According to appel-

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[82] More precisely, these figures represent the demand for coal and sludge shipped by barge, calculated without regard to the supply of barge services actually available on the Illinois.

[83] Table B-38 determines what portion of the demand for coal and sludge traffic will actually be supplied, given the limited capacity of the Illinois.

lants, loss of these potential revenues should have been taken into account in computing the cost-benefit ratio. The Corps justified exclusion of these losses on two grounds. First, it claimed that there is no real loss because the revenues are merely potential gains that may never accrue. Second, it argued that the potential revenues will merely be transferred from the railroads to the barge carriers, and that these transfer payments do not represent a real loss to the national economy. The first argument is not persuasive: all of the future costs and benefits of a project are speculative. In our view, however, the second argument is sufficient.

Appellants attempt to rebut the Corps' argument that the railroads' loss of future revenues does not represent a loss to the national economy by pointing out that some portion of those future revenues would have covered the railroads' fixed costs. According to appellants, that percentage should be treated as a loss to the economy, since fixed costs must be defrayed by charges to shippers regardless of volume. They further contend that as much as 40 percent of revenues would have been used to cover fixed costs. *See* Haveman Testimony at JA 1017; FEIS Vol. 2 at 429, 437. The Corps adequately responds to these arguments, however. In its FER it states that railroad fixed costs will become variable costs in the long run, and thus should not be treated as a loss to the economy. *See* FER Vol. 1 at 6-141 to 6-147.[84] The Corps has also stated that even if the percentage of future revenues that would have

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[84] In the FER the Corps states:

> By definition, all costs are variable in the long run. To assert that any sector of the transportation industry has costs which are immutable for any period of time approaching 50 years has no justification in the economic theory. It represents not economic theory, but economic apology.

FER Vol. 1 at 6-142 (footnote omitted). Fifty years is the period considered by the Corps in its cost-benefit analysis.

covered fixed costs should be treated as a real loss, that percentage is closer to 10 percent than 40 percent. *See* FEIS Vol. 2 at 429, 437; Daniel Testimony at JA 1783.[88] There is support for the Corps' position. *See* Department of Transportation 1977 Report at JA 2500. Under the circumstances, we cannot conclude that the approach adopted by the Corps was arbitrary and capricious.

Third, appellants claim that appellees should not have ignored system maintenance costs. But the Corps has explained that its cost-benefit analysis focused solely on the incremental costs and benefits attributable to the replacement project. It assumed that the costs of operating and maintaining the present waterways system will be paid regardless of future construction. The benefits derived from the system as a whole were also excluded from the analysis. Daniel Testimony at JA 1802–1804. The Corps always uses this incremental approach in performing its cost-benefit analyses. *Id.* The incremental approach is consistent with the principles set forth by the Water Resources Council in its *Principles and Standards* at SA 235.

V. Conclusion

We uphold the District Court's conclusion that it was without jurisdiction to review the pre-authorization cost-benefit analysis prepared by the Corps pursuant to the Water Resources Planning Act, the Water Resources Council's *Principles and Standards*, the Department of Transportation Act, the Rivers and Harbors and Flood Control Act of 1970, and its own cost-benefit regulations.

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[88] Assuming that 10% of future revenues of $135 million would have been used to cover fixed costs, and that this revenue loss should be treated as a loss to the national economy, the benefit-cost ratio remains above unity. Total benefits as most recently estimated are $86 million. Total costs are $44 million. *See* GDM Supp. No. 2 at 20–'9 (Table 20–8). Subtracting 10% of $135 million from total benefits of $86 million leaves total benefits of roughly $72 million, still well above total costs.

Since these statutes and regulations require a cost-benefit analysis primarily to aid Congress in evaluating water resources projects, a congressional decision to approve a particular project insulates the analysis from review. We also affirm the District Court's conclusion that it could review the question whether the Corps had complied with NEPA, and that the Corps fulfilled its obligations under that statute.

At the outset of its post-authorization planning the Corps decided that since no significant changes in external conditions had occurred since the enactment P.L. 95–502, the Locks and Dam 26 project should be implemented. We hold that this decision was not arbitrary and capricious. However, the Corps violated its own regulations when it decided not to conduct a public meeting during the course of its post-authorization planning; this meeting, which would have been nonadjudicatory, would have provided the community with an opportunity to comment on GDM Supp. No. 2 and other matters relating to the replacement project. The Corps should have been required to hold such a meeting. This project is extremely important; the public should have a final chance to state its views. We remand so that the District Court may amend its judgment to require a meeting to be held within 30 days of the time the judgment, as amended, becomes final. The judgment should also be amended to require the Corps to respond to the comments made at the meeting within 30 days of the time the meeting is held.

So ordered.

APPENDIX D

Filed October 23, 1979
James F. Davey, Clerk

UNITED STATES DISTRICT COURT
For the District of Columbia

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

Civil Action No. 74-1190

v.

CLIFFORD R. ALEXANDER, et al.

THE IZAAK WALTON LEAGUE OF AMERICA, et al.

Civil Action No. 74-1191

v.

CLIFFORD R. ALEXANDER, et al.

ORDER

In accordance with the Memorandum Opinion of even date herewith, it is, by the Court, this 23rd day of October, 1979,

ORDERED that a final declaratory judgment be, and the same hereby is, granted in favor of plaintiffs with respect to Count XI of their Amended Complaint, subject to the caveats in part VII of the accompanying Memorandum Opinion and, it is

FURTHER ORDERED that plaintiffs' request for injunctive relief be, and the same hereby is, denied, and it is

FURTHER ORDERED that a final judgment be, and the same hereby is, entered for defendants with respect to Counts III, VIII, X & XII of the Amended Complaint, and it is

FURTHER ORDERED that defendants' motion for involuntary dismissal, pursuant to FED.R.Civ.P. 40(b), be, and the same hereby is, denied.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

APPENDIX E

Filed October 23, 1979
James F. Davey, Clerk

UNITED STATES DISTRICT COURT
For the District of Columbia

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

v.

Civil Action No. 74-1190

CLIFFORD R. ALEXANDER, et al.

THE IZAAK WALTON LEAGUE OF AMERICA, et al.

v.

Civil Action No. 74-1191

CLIFFORD R. ALEXANDER, et al.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

This case involves the legality of the United States Army Corps of Engineers' ("the Corps") efforts to add a new "step" in the "stairway of the Mississippi." The "stairway" is the series of dams and locks which descend from the headwaters of the Upper Mississippi River and which, together with dams and locks on the Illinois River, comprise the Upper Mississippi River Navigation System; the "step" is Lock and Dam 26, a new dam and a new 1200-foot lock proposed for construction at Alton, Illinois.[1] This structure will replace the present edifice

[1] A map of the entire Inland Waterways System appears as Exhibit A to this opinion. This map was taken from the Report of the Board of Engineers for Rivers and Harbors at page 8 (Defendants Exhibit 58). A similar map appears at 382 F. Supp. 610, 613 (D.D.C. 1974). Other published opinions appear at 431 F. Supp. 722 (1977) & 459 F. Supp. 153 (1978).

which consists of a dam and two smaller locks. It will stand at the crossroads of the entire Inland Waterways System and serve as the gateway to America's breadbasket.

Plaintiffs, a conglomeration of eighteen midwestern railroads[2] and three environmental groups,[3] assert that further consideration of the Lock and Dam 26 proposal must be halted until defendants[4] have fulfilled their legal obligations. In essence, plaintiffs allege that defendants have failed to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4331-4347, ("NEPA"), and with their own regulations. The common denominator of plaintiffs' claims is that defendants have acted arbitrarily and capriciously in preparing an

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[2] The plaintiffs in Civil Action No. 74-1190 are: The Atchison, Topeka and Santa Fe Railway Company; Burlington Northern, Inc.; The Chicago, and North Western Transportation Company; Stanley E. G. Hillman as Trustee-of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; William M. Gibbons as Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company; The Denver and Rio Grande Western Railroad Company; Elgin, Joliet and Eastern Railway Company; Illinois Central Gulf Railroad Company, the Kansas City Southern Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Norfolk and Western Railway Company; St. Louis Southwestern Railway Company; St. Louis-San Francisco Railway Company; Soo Line Railroad Company; Southern Pacific Transportation Company; Toledo, Peoria & Western Railroad Company; and Union Pacific Railroad Company.

[3] The plaintiffs in Civil Action No. 74-1191 are: The Izaak Walton League of America, The Sierra Club, and The Izaak Walton League of America, Illinois Division.

[4] The defendants in both civil actions are: Clifford R. Alexander, Secretary of the Army; The United States Army Corps of Engineers ("the Corps"); and Major General John W. Morris, Chief of Engineers, Department of the Army. There is also an intervenor-defendant, the Association for the Improvement of the Mississippi River.

environmental impact statement ("EIS"), in selecting a recommended plan, and in deciding to go forward with the proposal. After a review of the evidence presented at a five-day trial, the Court finds that defendants have, to date, not acted arbitrarily or capriciously in the Lock and Dam 26 matter, except with respect to their own regulations. The Court is persuaded that defendants have neglected to conduct a public meeting, pursuant to Corps regulations. Accordingly, the Court shall issue a declaratory judgment to that effect, but it shall deny plaintiffs' petition for injunctive relief.

I. BACKGROUND

The history of this case largely concerns the parties' activities in two forums. First, in the courthouse, legal questions were resolved so as to require a trial, and the record of the Court's activity is vital to an understanding of the issues presented by the parties. Second, in the Corps' offices, the documents which rest at the heart of this suit were prepared and issued to the public; familiarity with these documents is equally vital to an understanding of the issues tried. The Court will briefly summarize the record of the parties' efforts in these forums, providing further background details where appropriate.

A. The Course of This Litigation.

Commercial navigation on the Upper Mississippi River and the Illinois River is made possible through a series of locks and dams known as the Upper Mississippi River Navigation System. The dams in this system control the depth and flow of the rivers, thereby assuring tow barges of navigable waters; the locks, by filling and emptying with water, carry tows, and other craft, up and down the stairway of water formed by the dams. Presently, on the Upper Mississippi River the waterways system consists of a series of twenty-seven locks and dams, extending from St. Paul, Minnesota to a point just south of the mouth of the Missouri River; on the Illinois River, there are seven locks

and dams, from Lockport, Illinois to LaGrange, Illinois. Plaintiffs' complaint concerns perhaps the most vital link in this impressive series of structures—the passageway to both the Illinois and Upper Mississippi Rivers. Just fifteen miles south of the juncture of these rivers (and eight miles north of the mouth of the Missouri River) stands Locks and Dam 26. All waterborne commerce shipped between the Upper Mississippi River Navigation System, and the Ohio River, the Lower Mississippi River and the Gulf Intracoastal Waterway must pass through these two locks. Locks and Dam 26, as it now stands, consists of a main lock, which is 600 feet by 110 feet, and an auxiliary lock, 300 feet by 110 feet. Complaining of both the soundness of the dam and the capability of the locks to efficiently handle increasing barge traffic, the Corps has, for the last eleven years, sought to cure these alleged defects by constructing a new lock and dam. Now, with the authorization of Congress, *see* Act of October 21, 1978, Pub. L. No. 95-502, 92 Stat. 1693 ("Public Law No. 95-502"), the Corps plans to replace this entire structure with a new dam and a single 1200-foot lock located two miles downstream. A brief account of this decade-long effort is helpful to an understanding of this Court's prior decisions.

The replacement project sought by the Corps was originally recommended in 1968 by the St. Louis District Engineer; this recommendation was for a new dam and two 1200-foot locks two miles downstream of the present structure. A year later, the Board of Engineers for Rivers and Harbors recommended immediate implementation of the plan. The Secretary of the Army, acting according to his perceived authority under section 6 of the Rivers and Harbors Act of 1909, 33 U.S.C. § 5, approved the project and, in fiscal year 1970, Congress appropriated funds for the design of the project.

On August 6, 1974, three environmental organizations and a host of midwestern railroads filed separate suits in this Court

seeking to prevent the initiation of construction on the two-lock project. That same day, Judge Corcoran issued a temporary restraining order prohibiting the letting of bids for the proposed Locks and Dam 26. One month later, this Court issued a preliminary injunction halting all further activity on the project. *Atchison, Topeka and Santa Fe Railway Co. v. Callaway,* 382 F.Supp. 610 (D.D.C. 1974). In issuing the injunction, the Court ruled that the proposed locks and dam were a new structure, rather than a rebuilt one, and as a result, congressional authorization under Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, was a prerequisite to the commencement of the Corps' work. *Id.* at 616-610. The Court found a likelihood that plaintiffs' would prevail on their claim that defendants had violated NEPA by not preparing a detailed statement which adequately discussed the systemic impact of the two-lock proposal and reasonable alternatives to the plan. *Id.* at 620-623.

After issuance of the injunction, the Corps restudied the original proposal for Locks and Dam 26 and decided to comply with the Court's decree. In August, 1975, the District Engineer in St. Louis, after preparing a draft supplemental EIS and updating the Corps' economic analysis, recommended a project identical in scope to the original plan. The Board of Engineers for Rivers and Harbors,[5] however, reviewed this proposal and recommended limiting its scope to a new dam and a single 110-foot by 1200-foot main lock, with provisions for adding a

[5] The Board of Engineers for Rivers and Harbors ("BERH") was established by Congress in section 3 of the Rivers and Harbors Act of 1902, 22 U.S.C. § 541. BERH provides an independent review of all survey reports for navigation, flood control and related purposes made in response to acts of Congress and resolutions of congressional Public Works Committees. It submits reports containing conclusions and recommendations on these proposed projects to the Chief of Engineers.

second lock after gathering certain environmental and economic data. In March, 1976, the Chief of Engineers issued his report to the Secretary of the Army substantially adopting the Board's recommendations. Upon receipt of the Chief's recommendation, the Secretary of the Army terminated his approval of the pending two-lock proposal. Finally, on August 4, 1976, the Secretary formally recommended to Congress that it authorize the construction of a replacement dam and 1200-foot lock and that it not authorize a second lock until an interagency study indicated that one should be constructed. "Letter of Transmittal," Final EIS at v. A proposed bill and a final environmental impact statement accompanied the Secretary's recommendation.

While Congress took up consideration of the Secretary's proposal, the parties renewed their efforts in this Court. In an opinion dated May 2, 1977, the Court found that the Secretary's withdrawal of approval from the Locks and Dam 26 project removed the possibility of harm to plaintiffs; accordingly, it dissolved the outstanding injunction. *Atchison, Topeka and Santa Fe Railway Co. v. Callaway,* 431 F.Supp. 722, 725 (D.D.C. 1977). The Court also reviewed plaintiffs' standing to seek relief while congressional action on the new project was pending. First, the Court recognized a private right of action to enforce the requirement established in section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), that an EIS accompany proposals for legislative action. *Id.* at 725-729. Second, it held that plaintiffs possessed standing to enforce this right and that their claims presented a justiciable case. *Id.* at 729-730. Later, the Court directed the parties to address the issue of the proposal before Congress; on November 29, 1977, the Court found that there remained before Congress a "proposal for legislation" by the executive branch with respect to Lock and Dam 26. Thus, the stage was set for continued litigation.

The parties' cross-motions for summary judgment were the next matters for judicial review. Plaintiffs' motion sought a

declaratory judgment that the Corps' Final EIS failed to comply with NEPA and that defendants' decision to propose legislation for the new project was arbitrary and capricious in light of the project's "true" costs and benefits. The Court denied plaintiffs' motion because it found material facts in dispute regarding the systemic impact of the project, the Corps' calculation of costs and benefits, and several other matters. *Atchison, Topeka and Santa Fe Railway Co. v. Callaway,* 459 F.Supp. 188, 190-192 (D.D.C. 1978). The Court also held that under NEPA, an evidentiary hearing was appropriate to assess the sufficiency of an environmental impact statement. Thus, review of the Final EIS could not be limited by the content of the administrative record. *Id.* at 192-193. Finally, the Court granted defendants' motion to dismiss plaintiffs' claims seeking to enjoin the proposal of authorizing legislation. *Id.*

While the Court was reviewing the legal merits of the parties' contentions, Congress was deliberating the merits of the Secretary's proposal. During the Spring and Summer of 1977, hearings were conducted before the appropriate committees in the House and Senate and the merits of the project were debated on the floor of Congress. *See* S. Rep. No. 95-215, 95th Cong., 1st Sess. (1977); H.R. Rep. No. 95-545 pt. 1, 95th Cong., 1st Sess. (1977); 124 Cong. Rec. S18,043-052 (daily ed. Oct. 23, 1978); *id.* H12,695-701; *Proposed Waterway User Charges and Replacement of Locks and Dam 26: Hearings on S. 712, S. 790 & S. 923 Before the Subcomm. on Water Resources of the Senate Comm. on Environment and Public Works,* 95th Cong., 1st Sess. (1977); *Replacement of Locks and Dam 26 at Alton, Illinois: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation,* 95th Cong., 1st Sess. (1977); *Locks and Dam 26: Hearings on S. 1285, S. 3425 & S. 3506 Before the Subcomm. on Water Resources of the Senate Comm. on Public Works,* 94th Cong., 2d Sess. (1976).

On October 21, 1978, President Carter approved H.R. 8533, 95th Cong., 2d Sess. (1978), thereby authorizing the replacement of Locks and Dam 26 with a new dam and 1200-foot lock located two miles downstream from the existing structure; the replacement would cost approximately $421 million. Act of October 21, 1978, Pub. L. No. 95-502, § 102(a), 92 Stat. 1695. The new law also instructed the Upper Mississippi River Basin Commission[6] to "prepare a comprehensive master plan for the management of the Upper Mississippi River System"; moreover, the law proscribed any "replacement, construction, or rehabilitation" which expands the navigation capacity of the existing locks, dams and chnnels until the Commission's master plan has been approved by Congress. *Id.*, §§ 101(a) & (i), 92 Stat. 1693 & 1695. In addition, the Act also expressly limited the navigation depth of the channels in the system to nine feet, except where specifically authorized by Congress. *Id.* § 102(c), 92 Stat. 1695. Thus, having obtained the approval of Congress, the Corps had at last complied with the mandate of 33 U.S.C. § 401, as construed by this Court's original decision in the case. *See* 382 F. Supp. at 616-610.

Plaintiffs responded to the legislation by promptly filing an amended complaint. The Court, in turn, instructed the parties to submit memoranda of law on the effect of Public Law No. 95-502. Defendants moved for summary judgment contending that plaintiffs' NEPA claims had been definitively resolved by Congress. The Court denied this motion, finding that the new law had not repealed NEPA, either by implication or by its express terms. First, because NEPA was essentially a full

[6] The Upper Mississippi River Basin Commission ("UMRBC") was established by Executive Order No. 11659, 37 Fed. Reg. 6047 (1972), pursuant to the power vested in the President by 42 U.S.C. § 19625. The Commission serves as the principal agency for the coordination of the development of water resources in its area.

disclosure law, it served *both* the public's and the legislature's need for information; this public interest compelled the continued acknowledgment of a private right of action, even after Congress had passed authorizing legislation. Second, the Court found that the legislative history underlying Public Law No. 95-502 indicated that Congress neither intended its authorization to resolve the adequacy of the Final EIS under NEPA, nor viewed enactment as a reflection of its opinion on that issue. Order, slip op. at 5 (March 16, 1979).

On the eve of trial, defendants renewed, in a limited fashion, some of the matters discussed in the Order of March 16, 1979. Specifically, defendants sought a ruling on the legitimacy of plaintiffs' claims under the Water Resources Planning Act of 1965, 42 U.S.C. §§ 1962 *et seq.*, the regulations promulgated pursuant to that Act, 33 C.F.R. pts. 290-295 (1978), and several other statutes and regulations.[7] In ruling on this motion, the Court essentially found that Congress intended NEPA to serve a much broader purpose than the other statutes upon which plaintiffs based their claims. While the Water Resources Planning Act of 1965 and the River and Harbor Act of 1970 were both intended primarily to assist congressional review, NEPA was designed to aid legislative as well as public review. Hence, the Court concluded that a private right of action to enforce compliance with NEPA survived congressional authorization; yet, once Congress had spoken, claims under

[7] In rejecting plaintiffs' claims under the Water Resources Planning Act of 1965, 42 U.S.C. §§ 1962 *et seq.*, and the regulations enacted pursuant to that statute, the Court relied upon the intent of Congress to provide guidelines primarily for its own benefit. Thus, once Congress had authorized a particular project, it would be improper for a court to intervene and compel compliance, absent proof of a change in post-authorization circumstances. Indeed, section 3 of the Act, 42 U.S.C. § 1962-1(a), provides, "Nothing in this chapter shall be construed . . . to limit the authority of Congress to authorize and fund projects."

other statutes could be extinguished. Accordingly, the Court limited the case to plaintiffs' claims under NEPA and under defendants' post-authorization regulations. Order (September 10, 1979). The issues having been narrowed, the case was at last ready for trial.

Before discussing the trial, one final point must be clarified. Confusion regarding the import of the Court's September 10, 1979 Order arose out of the parties' differences over the precise definition of the decision under review.[8] Plaintiffs evidently assumed defendants' post-authorization decision to build, *see* part III *infra,* was still subject to review to determine compliance with the same substantive regulations which were held not to be a basis for review of a legislatively approved proposal. Plaintiffs, however, have neither suggested, *nor proven, see* part VG *infra,* the occurrence of any material change in the eleven months since authorization by Congress. Under such circumstances, it would be pure legerdemain for the Court to review as a "post-authorization agency decision" the same matters which it has held beyond its review as a result of legislative action *before* the agency decision. Accordingly, the Court has not reviewed plaintiffs' claim that defendants' post-authorization decision to build violates the Corps' substantive cost/benefit regulations, 33 C.F.R. pts. 290-295. The Court finds, as a matter of fact, that there have been no material changes in circumstances since Congress acted and it holds, as a matter of law, that absent such changes, a valid claim has not been stated.

B. The Work of the Corps.

In response to this Court's decision in 1974, the Corps renewed its efforts to comply with NEPA and, in the process, created a host of documents. The Court provides the following chronology of these documents.

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[8] *See* part III, *infra.* The parties disputed whether the decision was administrative or legislative. The Court finds that it is essentially an administrative decision.

In June, 1975, the Corps issued a four-volume Draft Supplemental Environmental Impact Statement ("DSEIS") (Defendants Exhibit—hereinafter "DX"—46) and a three-volume Formulation Evaluation Report ("FER"), also referred to as "Design Memorandum No. 11" ("DM No. 11") (DX 43). Both of these documents evaluated and recommended *two* 1200-foot locks and a new dam at the same location as the present proposal. The FER, however, included an economic evaluation of a single 1200-foot lock. *See* FER, vol. 1, at table 8-7, page 8-9 (DX 43). After public hearings were held and further data collected, the Corps' St. Louis District published a Revised Draft Supplemental Environmental Impact Statement ("RDSEIS") (DX 47). One month later, the Board of Engineers for Rivers and Harbors issued its report ("BERH report") (DX 58) which evaluated the situation and recommended, for the first time, the current one-lock project. The Corps' Chief of Engineers adopted the Board's proposal when, in March, 1976, he completed a Draft Environmental Impact Statement ("DEIS") (Plaintiffs Exhibit—hereinafter "PX"—528). Finally, in July, 1976, the Corps published a two-volume Final Environmental Impact Statement ("FEIS") (DX 48) which analyzed the proposal for a single 1200-foot lock and a new dam. The FEIS incorporates by reference the RDSEIS, the FER and a final EIS issued in 1974. FEIS at 1. The Court must determine whether this FEIS conforms to the standards established by NEPA.

After publication of the FEIS, the Corps issued two other documents which are critical to this proceeding. First, in January, 1977, it published the Supplemental Economic Data, parts I and II ("SED") (DX 59). The SED basically updates the FER with data provided by research initiated in response to comments upon the FER. Second, on May 17, 1979, the St. Louis District of the Corps issued a document entitled Supplement No. 2 to Design Memorandum No. 2, General Design Memorandum ("GDM Supp. No. 2") (DX 61); this publica-

tion was intended to satisfy the requirements of the Corps' post-authorization regulations.

II. THE TRIAL

On September 10, 1979, the Court commenced a five-day trial. As further background to its findings of fact and conclusions of law, the Court provides the following summary of the issues tried and the evidence presented.

A. Issues

At trial, this Court was confronted with two basic issues: 1) whether defendants complied with NEPA and 2) whether defendants complied with their post-authorization regulations. The resolution of each of these issues requires an analysis of numerous matters.

The question of meaning and significance of defendants' post-authorization regulations are matters of vital importance. Plaintiffs' case in chief, at its heart, rests on the assumption that there exists a post-authorization decision by the Corps of Engineers to build or not to build the approved project. Plaintiffs believe that this is the decision which the Court must review. Defendants assert that the final decision on the project was made by Congress and the Chief Executive in Public Law No. 95-502, § 102(a), 92 Stat. 1695 (1978). Thus, at the outset, this Court must determine whether the Corps ever made a decision to build the new lock and dam.

Assuming the existence of an agency decision subject to judicial review, plaintiffs allege both procedural and substantive defects in the decision-making process. First, defendants failure to conduct a public meeting, with due notice for public comment, is alleged to violate the Corps' own regulations. Second, defendants omission of certain "losses" from its cost/benefits analysis is alleged to violate the substantive requirements of the Corps' regulations. The neglected "losses" are: 1) the future costs of maintaining the entire Upper

Mississippi Navigation System; 2) the projected losses to railroads which compete directly with river users; 3) the losses resulting from delays at upstream locks; and 4) the systemic environmental damage caused by increased use of the two rivers. For the reasons set forth in the concluding paragraph of part IA *supra*, the Court will not review this second allegation. *See also* part VG *infra*.

With respect to the question of defendants' compliance with NEPA, plaintiffs contend, *inter alia*, that the record is inadequate for judicial review, that three current proposals were not treated in the FEIS, and that several alternatives did not receive adequate consideration. Specifically, plaintiffs submit that the record is inadequate because defendants have relied upon "secret" data. Plaintiffs further argue that the FEIS should analyze the systemic impact of expanding the capacity of upstream locks, and also evaluate the environmental effects of alleged proposals to construct duplicate locks at certain dams along the Illinois River and to dredge a twelve-foot channel. Three alternatives to the proposed project, plaintiffs also submit, were inadequately evaluated; these possibilities are: 1) low-cost rehabilitation of the present structure; 2) investment in alternative transportation modes; and 3) more efficient methods of congestion control. Plaintiffs' environmental concerns center around defendants' purported failure to properly investigate the upstream biological impacts of the varying tonnages which move, or are projected to move, through the proposed lock and dam. Finally, plaintiffs argue that defendants' substantive decision regarding the costs and benefits of Lock and Dam 26 is arbitrary, capricious and in violation of section 101(b) of NEPA, 42 U. S. C. § 4331(b), because they neglected to weigh three factors: 1) system-wide maintenance costs; 2) revenue losses to railroads; and 3) alleged growth in traffic on the Illinois River.

B. The Evidence Offered at Trial.

At trial, plaintiffs presented their case through six expert witnesses, excerpts of depositions and hundreds of documentary exhibits. The plaintiffs' experts served not merely as conduits for the facts contained in the voluminous exhibits, but also as exponents of the conclusions which plaintiffs sought to have the Court draw from those facts.

Robert Haveman, a Professor of Economics at the University of Wisconsin-Madison, testified that review of the Corps' calculations was marred by non-disclosure of supposedly "secret" data. Dr. Haveman also stated that the Corps had failed to assess the systemic impacts of the proposed project. Relying solely on Corps statistics, he indicated that the Illinois River locks lacked the capacity to handle the increased traffic put through a 1200-foot lock at Alton and that this increase would lead to congestion and delay losses on the Illinois. As a result of this congestion, Dr. Haveman concluded that traffic would shift to the Mississippi River, causing congestion there and increasing the pressure to expand the locks on that river. He also noted that the Corps had neglected to evaluate the environmental impacts of either congestion on the Illinois or the shift in traffic to the Mississippi. Finally, Dr. Haveman stated that his findings indicated that costs for the project outweighed benefits. Plaintiffs' second expert, Dr. Joseph Carroll, a transportation economist with the Pennsylvania Transportation Institute, reiterated Dr. Haveman's testimony. He stated that, here, an analysis of *all* traffic—internal as well as Lock and Dam 26—on the Illinois was necessary to determine the impact of the project. He also testified that tonnage passing through Lock and Dam 26 would increase beyond Corps estimates due to larger tows.

Two biological experts, Drs. Thomas Claflin and Richard Sparks, speculated on the potential impact of tows on the ecology of the two rivers. Dr. Claflin, a Professor of Biology and Director of the River Studies Center, explained the proj-

ect's environmental impact upon the Upper Mississippi River. He stated that the river was a fragile ecosystem and that a very slight change could conceivably trigger events leading to eutrophication. Much of his testimony was dedicated to explaining the multitude of ways that the passage of a tow could potentially alter the surrounding ecosystem. Dr. Sparks focused his analysis on the Illinois River and reiterated the conclusions of his colleague.

Plaintiffs also presented an engineering expert, Mr. William A. Wahler. His testimony concerned the soundness of the present structure and the various low-cost methods of rehabilitating it. Mr. Wahler also attacked the accuracy of the Corps' safety analysis. Finally, Mr. John W. Ingram, President of Chicago, Rock Island and Pacific Railroad Company, testified regarding the projects' impact on midwestern railroads and, in particular, on his railroad. Mr. Ingram opined that construction of the new lock and dam could lead to the liquidation of the Chicago, Rock Island.

Throughout the tesimony of these experts, their opinions and conclusions were regularly compared to the contents of the FEIS and to defendants' post-authorization regulations. In this manner, the alleged shortcomings of the Corps' work were presented to the court.

Defendants responded by calling four witnesses to the stand. Colonel Leon McKinney, who had been District Engineer of the St. Louis District prior to his retirement in January, 1979, was one of the individuals responsible for supervising the preparation of the Lock and Dam 26 proposal. He testified regarding the inadequacy of the existing structures, the need for their replacement and, on cross-examination, the Corps' pre- and post-authorization procedures. Mr. Homer B. Willis, former Chief of the Engineering Division for the Civil Works Director in the Corps' Chief of Engineers Office, explained the engineering aspects of the FEIS. Dr. Daryl Simons, a river

mechanics expert with the Engineering Research Center at Colorado State University, testified regarding the physical movement of sediment into backwater areas. His testimony did not touch upon the biological impact of that sediment. Finally, Mr. Robert M. Daniel, Chief Economist in the St. Louis District, explained the economic aspects of the Corps' work. Together, defendants' experts sought to rebut plaintiffs' allegations and to argue on behalf of the soundness of both the FEIS and the Corps' course of conduct.

III. THERE EXISTS A POST-AUTHORIZATION ADMINISTRATIVE DECISION SUBJECT TO JUDICIAL REVIEW

Before discussing either plaintiffs' allegations, or the law which the Court must apply, it is imperative to define the nature of the decision which the Court must review. Is the decision at issue legislative or administrative? The Court finds that the decision is essentially administrative. The Court is persuaded first, that under prevailing Corps procedure, there exists a final decision on the merits of a particular project, even after Congress has authorized construction, and second, that such a decision was made regarding Lock and Dam 26. It is this decision—not that of Congress—which the Court must review.[9]

The Corps' regulations clearly provide for careful post-authorization analysis of a specific project to determine its adequacy under NEPA and other statutes. *See* Engineering Regulation (hereinafter "ER") 1110-2-1150 (PX 604); 33 C.F.R. §§ 209.410(g)(1), (n)(ii) & (p)(3), & .405(f)(5) (1978). Such study would certainly be otiose if the Corps lacked authority to determine whether or not to go forward with construction. Moreover, part 257 of title 33, C.F.R.,

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[9] Although the decision under review may be administrative, the activity of the legislature has also been considered. *See* part IA *supra*.

expressly delegates authority to division engineers to approve post-authorization documents which must be completed before a project may go forward. 33 C.F.R. § 257.4 (1978). This approval is tantamount to a final decision on the merits of a project and if approval may be given, it may also be denied. All testimony from Corps officials confirmed the plain import of these regulations. Both Colonel Leon McKinney, the District Engineer in St. Louis, and Mr. Edward Cohn, a Corps' official, tendered pursuant to Fed. R. Civ. P. 30(b)(6), testified that after authorization the Corps of Engineers not only analyzed the desirability of a project, but also retained the authority to declare a project unsuitable. McKinney Deposition (hereinafter "Dep.") at 21-29 & 48-49; Cohn Dep. at *passim*. Indeed, Mr. Cohn even conceded that there were projects within the Corps that had been authorized, but which the Corps had decided should not be constructed. Cohn Dep. at 68-69, 74 & 142-143.

Of course, congressional authorization to construct a 1200-foot lock and a new dam may not be construed as authorization to go forward with a different project. The evidence, however, shows that the Corps does retain authority to reassess, modify and, on occasion, stay a project which the legislature has approved. The Court finds that the Corps possessed this authority with respect to Lock and Dam 26, and that it exercised its decision to go forward with this project sometime after the issuance of the post-authorization study, GDM Supp. No. 2, in May, 1979. Finally, the Court holds that this decision is "final agency action" within the meaning of 5 U.S.C. § 704, and, therefore, subject to judicial review pursuant to 5 U.S.C. § 706.

Thus, there are two matters before the Court: first, whether the FEIS upon which defendants relied in deciding to go forward with construction complies with NEPA (counts III, VIII and X of the Amended Complaint) and second, whether the Corps' final decision to build complies with its own

regulations as well as 5 U.S.C. § 706 (counts XI and XII). Because a post-authorization decision is under review, the Court must examine the adequacy of the FEIS at the time that that decision was made, rather than when the document was submitted to Congress. Only the *present* adequacy of the FEIS is at issue.[10]

IV. STANDARDS OF REVIEW.

Having established the precise nature of the matters under review, the Court shall briefly summarize the standards which it must apply in examining plaintiffs' allegations. Where a particular claim requires a variation from these general standards, that variation will be discussed in the relevant findings of fact.

A. The National Environmental Policy Act.

NEPA is designed to foster the maintenance of "conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331(a). The law reflects a legislative recognition of the principle that "each person should enjoy a healthful

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[10] In the months following congressional authorization and the filing of plaintiffs' Amended Complaint, there was much debate among the parties regarding the Court's power to review the FEIS. In two orders dated March 16, 1979, and September 10, 1979, this Court held that it possessed the authority to review the FEIS because legislative authorization could not be construed as approval under NEPA. At the time the Court rendered these decisions, the precise nature of the decision-making process was a matter of dispute. By holding here that the final decision is indeed made by the Corps, the Court recognizes the change, from its prior orders, in the decision subject to review under NEPA. Instead of examining a congressional decision, the Court is now examining one by the Corps. The Court's prior opinions, however, remain vitally relevant: absent a reviewable congressional decision, the Corps' later decision might well be insulated from judicial scrutiny. *See* part IA *supra*.

environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." *Id.* § 4331(c). To achieve these goals, NEPA requires that every proposal for legislation, or other major federal action which significantly affects the human environment, be accompanied by a statement detailing the environmental impact of the proposed action, alternatives to the proposal, and the resources which would be irreversibly committed by the project. *Id.* § 4332(2)(C). This detailed statement, called an environmental impact statement ("EIS"), is intended to fulfill the legislative objectives of full disclosure and consultation. Moreover, it serves as the foundation for a careful and informed consideration of environmental values. *Calvert Cliffs Coordinating Committee* v. *United States Atomic Energy Commission,* 449 F. 2d 1109 (D.C. Cir. 1971).

In reviewing an EIS, trial courts must apply a "rule of reason." *Carolina Environmental Study Group v. United States,* 510 F.2d 796, 798 (D.C. Cir. 1975). The Court must determine whether the EIS has been prepared with objective good faith, and whether the final document set forth sufficient data to enable the decision-maker to fully consider environmental factors, and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action. *Sierra Club v. Adams,* 578 F.2d 389, 393 (D.C. Cir. 1978); *County of Suffolk v. Secretary of Interior,* 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978). The law requires the Court to demand compliance "to the fullest extent possible." 42 U.S.C. § 4331. The Court, however, should not substitute its judgment for that of the agency and attempt to resolve conflicting scientific opinions. *County of Suffolk v. Secretary of Interior, supra,* at 1383. So long as the agency's conclusions have a "substantial basis in fact" and its EIS sets forth responsible opposing views, the mandate of NEPA has been satisfied. *Id.*

In the instant case, the agency decision which must be reviewed under NEPA is also a "final agency action" within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704. Thus, NEPA review is intertwined with review under the APA and defendants must comply with both statutes. These laws, however, foster similar goals—the assurance of an open and reasoned decision-making process. Under the APA, judicial review must "be based on the full administrative record that was before the [decision-maker] at the time of his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1971). Because NEPA cases do not involve formal fact-finding, the precise content of the administrative record may be unclear. This Court believes that, at the very least, the record must contain all relevant studies and data used or published in compiling the statement; absent this material, a trial judge would be unable to review thoroughly the agency's conduct. In sum, under the APA as well as NEPA, the agency must "disclose the contents of what is relied upon or, in the case of publicly available information, specify what is involved in sufficient detail to allow for meaningful adversarial comment and judicial review." *United States Lines v. FMC,* 584 F.2d 519, 535 (D.C. Cir. 1978); *see* W. Rodgers, *Environmental Law* § 7.4, at 727 (1977).

The reasoned decision-making required by these two laws also imposes obligations regarding the timeliness of the data upon which the agency relies. Although the agency's obligation to perform research and experiments necessary to gather new data is governed by NEPA's "rule of reason," *see County of Suffolk v. Secretary of Interior, supra,* at 1378, the agency must not disregard current data which is already in existence. As the court of appeals for this Circuit has explained, an agency may not "shut its eyes to the events of the recent past" and rely on outdated information. *Seatrain Internation, S.A. v. FMC,* 598 F.2d 289, 293 (D.C. Cir. 1979).

B. Corps Regulations.

The Corps' post-authorization regulations appear in ER 1110-2-1150 (PX 604), ER 1105-2-507 (PX 603), and in two parts of title 33, C.F.R., which codify the ERs. Substantive review guidelines may be found at 33 C.F.R. pts. 290-295 (1978). These regulations are used by the Corps during the pre-authorization phase, first to determine whether to recommend a project and then later, to determine whether to go forward with building. In the post-authorization phase, these five parts of title 33 establish a methodology for analyzing costs and benefits; they also call for publication of that analysis in a document known as a "General Design Memorandum" ("GDM"). This GDM is the Corps' ultimate decision-making document. The EIS is used as an impact analysis which provides input into the decision-making process surrounding the GDM; it is not, by itself, a decision-making document.

Regulations governing the Corps' administrative procedure appear at part 209 of title 33, C.F.R. Section 209.410 establishes rules for the preparation of EISs during the pre- and post-authorization phases. These rules clarify, and elaborate upon, ER 1105-2-507 and upon relevant parts of ER 1110-2-1150.

For two reasons, this Court is persuaded that, as a matter of law, defendants are bound by the regulations which they have published in the Code of Federal Regulations. In *NRDC v. Callaway*, 524 F.2d 79 (2d Cir. 1975), the Second Circuit reviewed a claim that the Corps had violated its own regulations by illegally issuing a dumping permit to the United States Navy. Although the only extant Corps regulations did not govern the inland waters where the Navy had been dumping, the Corps had made specific reference to its ocean dumping guidelines in issuing the inland waters permit. The Second Circuit ruled:

> Having relied at least in part upon the standards of the Ocean Dumping Criteria to support its selection of the [inland waters] site, the Corps cannot now be heard to say that those standards are irrelevant to its issuance of the permit for this dumping project. By its own use of the standards it has made them applicable to this case. The federal courts therefore have the power and the duty to review the application of the Criteria to the extent that they were used by the Corps.

Id. at 85. Defendants have similarly relied upon their regulations in this case. Moreover, other courts have looked to the Corps' NEPA regulations, 33 C.F.R. § 209.410 (1978), in assessing Corps activity. *See Save the Dunes Council v. Alexander*, 584 F.2d 158, 164 (7th Cir. 1978); *Conservation Council of North Carolina v. costanzo*, 398 F.Supp. 653, 672 (E.D.N.C.), *aff'd*, 528 F.2d 250 (4th Cir. 1975). Accordingly, this Court holds that defendants are bound by part 209 of title 33, C.F.R.

The Corps' internal regulations, ER 1110-2-1150 and ER 1105-2-507, are subject to a different standard of review. In *Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977), the court of appeals explained that an unpublished provision "may be binding if so intended" by the agency. It instructed trial courts to ascertain that intent by examining the "provisions' language, its content, and any available extrinsic evidence." ER 1110-2-1150 describes some of its contents as mere principles. Thus, this regulation, like that in *Doe v. Hampton, supra*, is clearly precatory in part. Yet, as in *Doe*, a determination of which portions are precatory and which, mandatory, must be done on a section-by-section basis. The same analysis shall be applied to ER 1105-2-507.

V. FINDINGS OF FACT

In addition to its finding at part III of this opinion, the Court makes the following findings of fact.

A. The Corps has Not Complied With Its Own Post-Authorization Regulations.

To assess the Corps' post-authorization conduct in this case, one must first understand the rationale behind its behavior. After the Secretary of the Army "authorized" the Locks and Dam 26 project in July, 1969, the Corps commenced its "post-authorization" planning. Between June, 1971 and June, 1975, it issued eleven design memoranda (DMs) (DX 33-43). In 1974, however, this Court ruled that the project had not been properly authorized, 382 F.Supp. 610 (D.D.C. 1974); the Corps then complied with this Court's ruling by bringing the matter before Congress. Thus, as a result of the Corps' original misunderstanding about the appropriate authorizing body, the entire post-authorization process had almost been completed by the time Congress approved the new lock and dam in 1978. In May of this year, defendants attempted to comply with their post-authorization regulations by publishing GDM Supp. No. 2, an update of the DMs which would normally have been prepared at that time in the planning process, as required by ER 1110-2-1150.

Plaintiffs apparently recognize that a repetition of the studies performed in the DMs would be otiose and they do not contend that defendants should be compelled to repeat their prior acts. Their contention is simple: they argue that defendants should have conducted a public meeting to solicit public comments on GDM Supp. No. 2. The Court is persuaded that plaintiffs are correct.

First, section 209.405(f)(5) of title 33, C.F.R., unequivocally provides: "[A]t least one public meeting will be held in connection with the preconstruction planning of authorized projects." This provision reflects the emphasis upon public participation which is expressed in ER1110-2-1150 ¶18 and 33 C.F.R. § 209.405(d) (1978). The Corps contends that section 209.405(f) establishes only "general" advisory rules and that,

in this case, the holding of public meetings *before* congressional action renders further hearings unnecessary. *See* DX 63. The Court, however, believes that the strong interest in public participation, which is reflected in other Corps regulations, is persuasive evidence that section 209.405(f)(5) is not precatory. The Corps' NEPA regulations are equally explicit. They provide, "Public meetings ... will be held during post-authorization planning studies to insure that views of interested parties will be considered in the development of the plan and that all interested parties will be kept informed of study progress. ..." 33 C.F.R. § 209.410(n)(ii) (1978). The latter portion of this regulation refers to the very situation confronted by the Court. It states that additional meetings should be held when there is an "unusual time lapse or significant changes in the authorized project." *Id.* Here, it has been four years since the original meetings were held and, in addition, the "authorized" project has changed from a two-lock proposal in 1975, when the only public meetings convened, to one involving a single 1200-foot lock.

Even accepting the Corps' assertion that it is not obliged to follow these provisions in every instance, the Court finds this case is clearly one in which such a hearing should have been held. Lock and Dam 26 is a major project which has, to say the least, attracted extensive public notice. Its economic and environmental impact may eventually be felt in every home and farm in the Midwest. Moreover, at stake is the soundness, utility and beauty of perhaps the greatest water resource on the continent—the Upper Mississippi and its tributaries. In light of the grave importance of this project, the defendants certainly acted arbitrarily in finding that further exchange of information and opinion with the public was unnecessary. Defendants' arbitrariness is heightened by the Corps' failure to hold *any* public meeting on the single-lock proposal. The "extensive hearings" held in 1975 concerned the DSEIS; they preceded the BERH report which first recommended a single 1200-foot lock.

Thus, to date, the public has only commented to the Corps upon a two-lock proposal. Finally, the developments over the last three years are significant: the SED and GDM Supp. No. 2 have been issued and the project proposal has been altered drastically. The Corps has clearly erred by ignoring its own regulations which grant the public a right to comment on these developments.

In order to comply with its own regulations, the Corps should conduct a public meeting after due notice for comment and preparation. Moreover, the Corps should delay any final decision on Lock and Dam 26 so that it may reconsider its stand in light of public commentary.

B. The Administrative Record is Adequate for Judicial Review.

Plaintiffs attack the adequacy of the administrative record on the ground that the Corps has failed to include certain raw data which is vital to an evaluation of the FEIS. The Court is persuaded that plaintiffs have no claim to the data which they seek.

The Corps used the data at issue to calculate the rate savings shippers would receive with the expansion of Locks 26's capacity. The Corps' positive findings on this point add measurably to the projected benefits of the proposal. Accordingly, the validity of the rate savings figures is a crucial matter to those who oppose construction of the new lock and dam. The Corps' rate savings figures are compiled by comparing the actual cost of shipping by barge with the rate on an alternative mode. The data underlying these figures was gathered by Charles R. Donley & Associates, a private consultant hired by the Corps. Most of this data is already available to the plaintiffs; for 231 different shipping movements, plaintiffs know the tonnage, the commodity, its origin, destination and average rate. *See* FER, vol. III, app. I & J (DX 43). Only the rate of a particular movement and the identity of an individual carrier is

not disclosed. Defendants submit that this data is confidential proprietary information and that Charles R. Donley & Associates only received this information by guaranteeing its confidentiality.

Plaintiffs have presented this Court with no evidence contradicting the Corps' position that this data is legitimate proprietary information, nor have they argued that the figures used by the Corps are inaccurate. The figures which plaintiffs seek are largely derived from long-term shipping contracts. FER, app. I, at app. I-16. Disclosure of this data is certainly likely to cause substantial harm to the competitive position of the firms from which it was obtained. Accordingly, the Court finds that this information is proprietary and privileged.

It is well established that an agency is entitled to claim a privilege with respect to documents that might have influenced a particular decision. *National Courier Association v. Board of Governors of the Federal Reserve System,* 516 F.2d 1229, 1241-42 (D.C. Cir. 1975). Indeed, this Court, in its Order of October 21, 1974, ruled that disclosure of similar proprietary information would "compromise the competitive situation" of those interviewed and that non-disclosure would not impair the rights of the plaintiffs. Having examined plaintiffs' evidence, the Court is unpersuaded that it should change its position. Accordingly, it finds the administrative record adequate for judicial review.

C. The FEIS Adequately Considers Alternatives to Lock and Dam 26.

NEPA requires defendants to include in their FEIS a discussion of "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). Plaintiffs contend that the FEIS fails to address the following three alternatives to the proposed Lock and Dam 26 project: 1) low-cost rehabilitation of the present structure; 2) investment in alternative transportation modes; and 3) improved congestion control. The Court finds that the FEIS's treatment of these alternatives is adequate.

Before detailing plaintiffs' proof, it is important to discuss the special standard of review which trial court's must apply in examining post-authorization alternatives. Although NEPA's rule of reason still governs, this Court must take into consideration, not merely the fact of congressional action, but also the nature of that action. In *Sierra Club v. Adams,* 578 F.2d 389, 396 (D.C. Cir. 1978), the court of appeals explained, "While subsequent congressional action does not vitiate the need for an environmental impact statement or a discussion of alternatives (unless explicitly stated in the statute), such action does have a bearing on what is considered a reasonable alternative, and a reasonable discussion." In that case, the court approved "somewhat brief" discussions of alternatives "in view of the fact that Congress has authorized United States assistance in constructing a *highway."* 578 F.2d at 396 (emphasis in original).

Plaintiffs' allegations regarding the analysis of low-cost rehabilitation alternatives are largely precluded by Public Law No. 95-502, § 101(j), 92 Stat. 1695. The Corps originally dismissed the possibility of low-cost rehabilitation as excessively dangerous. FEIS, at 74, 186-188 & 451 453. At trial, plaintiff's expert, Mr. William Wahler, a distinguished engineer and dam safety analyst, testified about both the various low-cost methods of rehabilitating the present Locks and Dam 26 and the flaws in the Corps' safety inspection of the structure. Yet, regardless of his comments, the FEIS's treatment of this alternative is certainly adequate in light of the legislation authorizing Lock and Dam 26. In section 101(j) of Public Law No. 95-502, Congress expressly directed that the new structure be designed "to provide for possible future expansion." Plaintiffs' evidence fails for the simple reason that the proposed low-cost rehabilitation does not provide for this potential expansion. Hence, it would not comply with the mandate of Congress.

Moreover, even assuming that Public Law No. 95-502 could be construed to permit mere rehabilitation of Locks and Dam 26, plaintiffs' proof would still be deficient. The Corps'

engineering expert, Mr. Homer Willis, testified adequately about his difference with plaintiffs' expert, Mr. Wahler. Tr. at 86-118 (Sept. 19). This Court will not attempt to resolve conflicting scientific opinions, thereby substituting its judgment for that of the defendants. *County of Suffolk v. Secretary of Interior*, 562 F. 2d 1368, 1383 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978). Based on Mr. Willis' testimony and the comments in the FEIS, the Court is persuaded that the document contains an adequate discussion of low-cost rehabilitation and that defendants had a reasonable basis for their decision to forsake this alternative.

Plaintiffs' allegation that defendants inadequately considered alternative investments in other transportation modes is equally defective. As in *Sierra Club v. Adams, supra*, congressional authorization has favored a specific mode of transportation. Hence, Corps discussion of other modes may be limited. Here, the Corps assumed that alternative investment was really no different from a "no action" alternative. FEIS at 76. Of course, alternative investment would involve no action at Locks and Dam 26 but, in contrast to a "no action" plan, plaintiffs would have the Corps actively explore the investment possibilities of the money currently funding a new lock and dam. Although the Corps has not conducted the major study urged by plaintiffs, it has certainly afforded alternative transportation fair consideration. *See* FER at 3-11 to 3-29 & 6-71 to 6-105 (DX 43); RDSEIS at 6-93 to 6-134 (DX 147). Moreover, plaintiffs second alternative does not address the problem of physical deterioration of the present structure. In view of the congressional mandate to invest in the Inland Waterways System, the Court finds the Corps' discussion adequate.

Finally, plaintiffs offer that defendants should have examined methods of controlling congestion at the current structure. They suggest that the imposition of a congestion toll would deter many inefficient tow operators from using the locks. Tr.

at 187-189 (Sept. 10). Again, however, this alternative takes into account neither the congressional mandate to provide for expanded capacity, nor the Corps' concern with the structural soundness of Locks and Dam 26. Moreover, plaintiffs expert conceded that at the present time, the Corps lacks the legal authority to impose a congestion toll. *Id.* at 245. Although it is uncontested that defendants have not explored the possible use of a toll, the Court in unpersuaded that they should be compelled to do so. It would certainly be a waste of agency resources to test the efficiency of an alternative which is not only beyond the agency's power, but also incapable of either fully solving the problem at hand or fulfilling the mandate of Congress. Accordingly, the Court finds defendants failure to consider the alternative of a congestion control a reasonable decision.

D. The FEIS Need Not Consider Proposals for Projects at Other Points on the Two Rivers.

It is well established that under NEPA an EIS for one project must discuss the impact of other projects which are so related as to be part of the same "action." *Scientists Institute for Public Information, Inc. v. AEC,* 481 F. 2d 1079, 1087-88 (D.C. Cir. 1973). The cumulative environmental impact of a planned series of related projects cannot be shielded by the preparation of separate EISs. Thus, a trial court must determine whether various projects before an agency are sufficiency [sic] interrelated and sufficiently ripe that the agency is really considering a single proposal. Further, the Supreme Court has construed NEPA to require an impact statement only at the time at which the agency actually "makes a recommendation, or report on a *proposal* for federal action." *Kleppe v. Sierra Club,* 427 U.S. 390, 406 (1976) (emphasis in original). Plaintiffs contend that the Corps' FEIS is inadequate because it fails to include an assessment of the environmental impacts of the following: 1) a twelve-foot channel for the Illinois and Upper Mississippi Rivers; 2) the Illinois Duplicate Locks project; and

3) the "inevitable" expansion of capacity at all upstream locks. Defendants response is twofold. First, these projects have not yet ripened into actual proposals; second, the Corps is barred by the express language of Public Law No. 95-502 from either making, or even considering, these alleged proposals. This Court is persuaded that the defendants did not act arbitrarily by failing to include an assessment of the impacts of the alleged proposals in the FEIS for Lock and Dam 26.

At present, the Upper Mississippi River Navigation System employs a nine-foot draft channel. The depth of this channel directly limits barge capacity; with a deeper draft channel, larger barges could traverse the system. Plaintiffs have successfully proven that the sill depth of the proposed 1200-foot lock is designed for a twelve-foot draft navigation. DM No. 2, at ¶ 12-02a(5) (DX 34). However, they have failed to show that a proposal for a twelve-foot draft channel is currently pending before the Corps. First, plaintiffs have not offered any evidence to indicate that the irretrievable commitment of resources to a single deeper draft *lock* will place Congress and the Corps under an obligation—economic or otherwise—to re-dredge the entire Upper Mississippi River Navigation System. Moreover, defendants have shown that the deeper draft sill is independently justified because it will increase the lock's efficiency in handling nine-foot draft barge traffic. FEIS, at 5. In addition, they have shown that no proposal for expansion is actually under consideration by the Corps. The FEIS explicitly disclaims. "[A] 12-foot channel . . . is not economically justified above the mouth of the Illinois River." *Id.* Finally, the Court recognizes that the legislation authorizing Lock and Dam 26 expressly precludes the proposal which plaintiffs allege is under consideration. Section 102(c) of Public Law No. 95-502, 92 Stat. 1695, provides, "[N]either the Secretary of the Army nor any other Federal official shall study the feasibility of deepening the navigation channel in . . . the Mississippi River north of

Cairo, Illinois . . . and the Illinois River . . . unless specifically authorized by an Act of Congress." In light of the foregoing, the Court finds that defendants need not consider the environmental impact of a twelve-foot draft channel in their FEIS for Lock and Dam 26.

Similar flaws underlie plaintiffs' allegations concerning the Illinois Duplicate Locks Project. Although a General Design Memorandum for this project was prepared in December, 1974 (PX 516), there is clearly no pending proposal to complete the project. Section 101(i) of the authorizing Act precludes any project that would expand the capacity of the present system, until Congress has approved the master plan, called for in section 102(a), on the development of the waterways system. Thus, by statute, Congress has forced the Corps to withdraw what might have earlier been a pending proposal. Moreover, as with the deeper channel, plaintiffs have failed to show that a new lock and dam at Alton will necessitate new locks on the Illinois River. The Corps' evidence clearly indicates that a new 1200-foot lock will not constrain the capacity of the smaller locks on the Illinois. *See* part VF *infra*. Hence, the Corps did not act arbitrarily in declining to assess the impacts of expanding the capacity of locks on the Illinois River.

Having determined that the FEIS need not address the Illinois River expansion, the Court finds, *a fortiori*, that the document need not treat expansion on the Upper Mississippi. No design memorandum has even been prepared for this possibility and lock expansion on the Mississippi is also precluded by Public Law No. 95-502. Accordingly, the Court finds that defendants did not act arbitrarily by declining to assess the impact of lock expansion on the Upper Mississippi.

E. The FEIS Adequately Examines the Environmental Impact of Increased Usage of the Inland Waterways System.

Of course, the *sine qua non* of every EIS consists of an analysis of the environmental impacts of the proposed project. Plaintiffs argue that the FEIS contains no genuine assessment of the systemic biological impact of either the present barge traffic or the increment in traffic caused by expanding the capacity of Locks 26. This impact is systemic because traffic from the lock moves up and down the length of the two rivers.

All parties agree that determining the environmental effect of river usage is a two-step process. First, one must determine the physical effects of barge traffic; one may then use this information to measure biological impacts. The short-term physical effects of barge traffic are fairly well known. The swift current passing between the barge bottom and the channel floor picks up bottom sediment and creates a plume of resuspended sediment to the stern of the barge. Because this sediment may remain resuspended for one to three hours, plumes can stretch for as long as two miles. Tr. at 99-101 (September 11); PX 570. Once the sediment has been resuspended, it is carried laterally, by the main channel flow, into backwater areas on the Illinois and Upper Mississippi Rivers. Plaintiffs' expert, Dr. Claflin, indicated that the passage of a single tow could cause up to 2,700 pounds of sediment to be introduced into an adjacent backwater area. This sediment also affects the turbidity of the river. Further, tow traffic creates wave wash which causes bank erosion. In addition, a tow can draw water away from, and out of, adjacent side channels, thereby exposing the river bottom. The flow of the river may also be reversed following the passage of a tow.

The Corps' treatment of the long-term systemic biological impact of these physical effects appears on pages 53 to 59 of the FEIS. This discussion is based on four studies which center around the physical impacts of tow traffic. The Corps declined

to engage in extensive biological research because its reports indicated that the physical effects of increased tow usage would be minor. The Court finds that the Corps' conclusion was reasonable and that the FEIS adequately discusses the nature of the systemic environmental impacts.

NEPA does not impose an obligation upon federal agencies to examine every conceivable environmental consequence. Rather, the agency must look to current data to determine which impacts will occur and which potential impacts merit further research to determine the likelihood of their occurrence. Where lack of research leads to uncertainty, or gaps in knowledge, the EIS must point out this shortcoming. In *Jicarilla Apache Tribe of Indians v. Morton*, 471 F. 2d 1275, 1280 (9th Cir. 1973), the court of appeals explained, "Neither § 102(2)(B) nor (C) [42 U.S.C. §§ 4332(2)(B) & (C)] can be read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken. If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated." Here, the Corps has adequately explained the environmental uncertainty associated with Lock and Dam 26 and it did not act arbitrarily in declining to engage in research necessary to cure the uncertainty.

First, the FEIS does not disclose the environmental impacts likely to follow construction. It explains that turbidity may interfere with fish habitats and the photosynthesis of aquatic plants and that increased sediment drift into side channels may alter the ecology of these backwater areas. FEIS, at 24-25 & 53-68. The report, however, concluded that the physical impact of increased usage was minimal and would probably pose no threat to the environment. A single 1200-foot lock would only lead to a capacity increase of eighteen percent; in terms of tows per day, this would mean approximately three more tows a day on each of the two rivers. FEIS, at 72.

Moreover, the Corps' studies showed that the sediment which would reach backwater areas because of tow traffic would still be deposited if there were *no* traffic. Tr. at 256 (Sept. 18). Evidently, during periods of high flow, the river itself presently transports sediment and deposits it in these backwater areas. *Id.* at 255-257. With respect to turbidity, the studies showed that tow passage did not raise turbidity to dangerous levels on the Mississippi and that dangerous levels existed on the Illinois regardless of tow passage. RSDEIS, at 4-64 to 4-65. Although a quantification of these minor physical impacts is within the state of the art, such a study would take from five to ten years. *Id.* at 261; Tr. at 191 (Sept. 11). The Corps, therefore, concluded that the physical impacts created by three tows per day did not justify the time and expense (approximately five to ten years and several million dollars) needed to assess the attendant environmental effects. Significantly, prior to this decision, the Corps did commission a brief study of the environmental impacts upon the fragile ecosystem of the Illinois River. That study relied on currently available data and did not involve original research. The study was unable to conclude that the projected increase in tow traffic would have a significant biological impact. Finally, the FEIS fully points out the gaps and uncertainty of the Corps' approach. RSDEIS, at 4-55 to 4-72 & 9-89 to 9-94.

Plaintiffs contend, in essence, that the Corps' failure to perform a study of the long-term systemic ecological impacts of the proposal precludes any bona fide conclusion about those impacts. Thus, in order to fully apprise the decision-maker of the environmental effects of Lock and Dam 26, plaintiffs would have defendants devote five to ten years to gathering raw data and preparing a report. Plaintiffs', however, offer no evidence other than testimony of the experts who dispute the Corps' basic findings on the physical impacts of tow traffic. They have not shown that those studies were improperly performed or that the Corps' conclusions were arbitrary or capricious. Accord-

ingly, the Court is persuaded that the FEIS adequately discloses both systemic environmental uncertainties and impacts alike. It finds that defendants' failure to perform an in-depth study of the environmental effects of an eighteen percent increase in tow traffic was neither arbitrary, capricious, nor violative of NEPA.

F. The Defendants Decision to Build Does not Violate NEPA.

NEPA imposes procedural and substantive obligations on the defendants. This Court has already held that defendants did not violate their procedural obligations by failing to investigate the systemic environmental impact of increased tow traffic or to consider other alternatives or proposals. To assess their conduct with respect to the substantive mandate of section 101(b) of NEPA, 42 U.S.C. § 4331(b), the Court must determine whether "the actual balance of costs and benefits was arbitrary or clearly gave insufficient weight to environmental values." *Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission,* 449 F.2d 1109, 1115 (D.C. Cir. 1971). Having found that defendants included adequate environmental data in their FEIS, the Court is also persuaded that they gave sufficient weight to environmental values. Plaintiffs, however, submit that the Corps' substantive decision is flawed in other respects. Specifically, plaintiffs claim that defendants erred by: 1) failing to properly quantify congestion on the Illinois River; 2) omitting the costs of system-wide maintenance; and 3) failing to treat certain railroad losses as costs.[11] The Court finds that none of plaintiffs' charges provide a basis for holding defendants in violation of NEPA.

Plaintiffs contend that the Corps has grossly underestimated the growth of internal (*i.e.,* non-Lock and Dam 26) traffic on the Illinois River. They submit that current Corps data indicates that coal and sludge traffic will expand rapidly;

[11] *See* part IA, *supra* and part VG, *infra.* The Court only considers these allegations in the NEPA context.

this expansion will increase delay losses on the Illinois River, lead to greater usage (and therefore congestion) on the Upper Mississippi, and create even more coercion for expanding the Illinois lock system. The Corps' economic expert, by contrast, believes that internal traffic will not increase measurably and that the Illinois locks will be able to handle future traffic growth without constraint. The only data upon which plaintiffs rely is taken from a GDM prepared by the Corps' Chicago District for the Illinois Duplicate Locks proposal (hereinafter "Chicago GDM"). Tr. at 121-128 (Sept. 10); Chicago GDM, at tables B-26 & B-32 (PX 316). Yet, other portions of the Chicago GDM explain that the predictions offered by plaintiffs rest on the supposition that lock capacity will expand. Without this expansion, the report indicates that coal and sludge traffic can be expected to remain at current levels. *See* Chicago GDM, at table 3-38. In addition, more recent data supports the Corps' conclusions on internal traffic growth. Tr. at 35 & 136 (Sept. 19). Accordingly, the Court finds that the Corps did not act arbitrarily in deciding not to adopt the figures which plaintiffs have selected out of context from the Chicago GDM.

As a variation on their claim regarding internal traffic growth, plaintiffs contend that the Corps' cost/benefit analysis rested upon the assumption that new 1200-foot locks were in place along the Illinois River. The replacement, on paper, of the present 600-foot locks theoretically cuts down on delays, thereby increasing benefits to barge shippers. Defendants reply that their conclusion that there would be no significant up-stream congestion was not based on the assumption that 1200-foot locks were in place on the Illinois River. The charts containing the alleged paper replacement appear at tables 3 & 4 of the FEIS. Although table 4 may be confusing[12], other sections of the FEIS clearly indicate the Corps' assumption that

[12] The footnote on this table evidently refers to plans other than the recommended plan. *Compare* FEIS, at 74 *with* RSDEIS at 6-20, 6-149 & 6-168 to 6-177.

traffic on the Illinois would not expand beyond existing 600-foot lock capacity. The preface states, "No system improvements are required to move this tonnage; therefore, there are no system costs attributable to the proposal." FEIS, at 5. Table 1 also contains tonnage figures which support the Corps' conclusion. Having found that capacity would not be constrained with 600-foot locks, the Corps decided it could use data based on an equally constraint-free 1200-foot lock system. In light of the foregoing, the Court is not persuaded that this decision was improper.

Plaintiffs are also incorrect in their allegations regarding defendants' failure to treat system maintenance as a cost. On cross-examination, the Corps' economic expert conceded that the costs of maintaining the Inland Navigation System had been omitted from the project's cost/benefit analysis. Tr. at 55-59 (Sept. 19). Yet, this expert fully explained the rationale for the omission. *Id.* at 151. The Corps assumes that the costs of operating and maintaining the present system will be paid regardless of further construction; thus, it neglects not only these costs, but also the benefits derived from the system. This exclusion allows the Corps to limit its review to the proposed improvements' incremental costs and incremental benefits. Indeed, the Corps correctly submits that its own regulations compel an incremental analysis. *See* 33 C.F.R. §§ 290.9(c) & 295.4 (1978). Moreover, the FEIS clearly indicated the type of analysis employed, *Compare* FEIS, at 329 *with id.*, at 436. The Court finds that this approach is entirely reasonable and that defendants did not act arbitrarily by overlooking system costs.

Finally, plaintiffs assert as error defendants' failure to treat certain railroad losses as costs. These losses are the $135.1 million in revenues which railroads are projected to receive if the new lock is not constructed. FER, at ¶ 6.03(i)(1) (DX 43). The Corps excluded these "losses" for two reasons. First, it decided that there is not a real loss because the revenue is

merely potential gains which may never accrue. Secondly, the potential revenue in question will merely be transferred to other carriers and thus, these transfer payments will not result in any real loss to the national economy. Tr. at 158 (Sept. 19). Plaintiffs further contend that forty percent of this projected revenue goes to fixed costs and that a loss in this area is not a mere transfer payment. The Corps, however, rejected this percentage as excessive and found further that small losses to fixed costs could be offset by gains which railroads would derive from increased usage of the rivers. Finally, although rail revenues may have been omitted from the cost/benefit analysis, this impact was fully discussed in other portions of the FEIS. FEIS, at 67. Accordingly, the Court finds that the Corps' decision to ignore rail revenues was rational and not misleading.

G. There Has Been no Change in the Material Circumstances Underlying the Corps Substantive Decision in the Post-Authorization Period.

This Court has already indicated that it will not review plaintiffs' claims that defendants' post-authorization decision does not comply with the substantive requirements of parts 290 to 295 of title 33, C.F.R. *See* part IA, *supra*. Plaintiffs submit that defendants have omitted the following four matters from their cost/benefit analysis: 1) the future costs of maintaining the entire Upper Mississippi Navigation System; 2) the projected losses to railroads which compete directly with river users; 3) the losses resulting from delays at upstream locks; and 4) the systemic environmental damages caused by increased use of the two rivers. These omissions are alleged to violate Corps regulations.

The Court finds that the facts underlying each of these omissions were fully developed at the time Congress approved the cost/benefit analysis and further, that no new facts relating to these claims have occurred in the months following author-

ization. Accordingly, the Court shall dismiss plaintiffs' claim that defendants have failed to comply with their own substantive post-authorization regulations. *See* part IA, *supra*.

H. Conclusion.

In sum, the Court finds that the FEIS provides the Corps with sufficient information, both environmental and economic, to make an informed decision about the merits of the Lock and Dam 26 proposal. It finds further that the Corps' decision to go forward with construction was neither arbitrary, capricious nor did it give insufficient weight to environmental values.

VI. CONCLUSIONS OF LAW

Based on part III and part V of this opinion, the Court makes the following conclusions of law.

1. The defendants post-authorization administrative decision is subject to judicial review under 5 U.S.C. § 706.

2. The Corps' failure to conduct a public meeting after appropriate notice, violates 33 C.F.R. §§ 405(f)(5) & 209.410(n)(ii) and ER 1110-2-1150 ¶ 18.

3. The administrative record is adequate for judicial review, despite the absence of raw data which is bona fide confidential business information.

4. The Corps' failure to conduct a study of the long-term systemic environmental impacts of increased barge traffic on the Illinois and Upper Mississippi Rivers does not violate 42 U.S.C. § 4332(2)(C).

5. The FEIS adequately details alternatives to the proposed plan and complies with sections 102(2)(C)(iii) & 102(2)(E) of NEPA, 42 U.S.C. §§ 4332(2)(C)(iii) & 4332(2)(E).

6. The FEIS's failure to examine the environmental impact of a twelve-foot channel, of expanded locks on the

Illinois River, and of further expansion on the Upper Mississippi River, does not violate section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C).

7. The defendants adequately studied barge traffic on the Illinois River as well as revenue loss to rail carriers; its treatment of this information is neither arbitrary, nor capricious, nor in violation of section 102(2)(C) or 101(b) of NEPA.

8. The defendants' failure to weigh system-wide maintenance costs in balancing costs against benefits was neither arbitrary, nor capricious, nor in violation of section 101(b) of NEPA.

9. The defendants' conclusion that benefits exceed costs for Lock and Dam 26 is neither arbitrary, nor capricious, nor in violation of section 101(b) of NEPA.

VII. REMEDIES

Having found that plaintiffs have prevailed on Count XI of their Amended Complaint, the Court must now determine the appropriate remedy. Plaintiffs seek an injunction as well as a declaratory judgment. In the interest of comity, the Court will enter a declaratory judgment in favor of plaintiffs, but will not provide injunctive relief.

This Court has previously examined the role of declaratory relief of the NEPA context. 431 F. Supp. 722, 730 (D.D.C. 1977). In that decision, the Court explained that "declaratory relief alone is sufficient to enforce NEPA's EIS requirement" because "the Court can assume that if it determines that the final EIS is inadequate, then the defendants would correct the deficiencies in the EIS 'without the coercion of a Court order.'" *Id.* (quoting *Dunlop v. Bachowski,* 421 U.S. 560, 575 (1975)). By the same analysis, the Court also concludes that defendants will comply with their own regulations once a violation has

been found. In the past, defendants have accepted this Court's decrees and the results have certainly been ameliorative: the American public, through their representatives in Congress, have benefited from the opportunity to evaluate, modify, and approve construction of a new lock and dam at Alton, Illinois. This involvement certainly constitutes a victory for the environment. The Court presumes that defendants will continue to abide by a course of behavior which will further the ends of justice. The Court finds, nonetheless, that injunctive relief would not be appropriate in this instance.

The court of appeals for this circuit has recently explained, "The decision in each case whether the preservation of an agency's options upon reappraisal justifies the costs of delay rests, of course, in the sound discretion of the court." *Realty Income Trust v. Eckerd,* 564 F.2d 447, 457 (D.C. Cir. 1977). In making that decision, the Court must balance the parties' interests as well as the public interest; here, this balancing indicates that injunctive relief would be inappropriate. First, and more importantly, the public interest lies in the continued pre-construction planning of Lock and Dam 26. The Court accepts Public Law No. 95-502, enacted after more than a year of congressional debate, as the definitive statement on the public interest. Although the Corps' regulations may also serve an important public purpose, they should not be permitted to delay an Act of Congress when the legislative decision reflects a close consideration of the project at issue. Second, plaintiffs would certainly receive no benefit from further public meetings. They have already participated vigorously at the administrative and legislative levels and they have proffered no new ideas which they wish to tender at a public meeting. In light of the major significance of this project, the public too has already received an extensive opportunity to comment through—and to—their representatives in Congress.[13] Moreover, Congress

[13] A public meeting under 33 C.F.R. 209.405(d) is not the same as a legislative hearing; the two, however, serve similar purposes.

devoted twelve days of hearings to the merits of the Lock and Dam 26 proposal and the Act, which was ultimately approved, eliminates the Corps' discretion in the project planning. As a result, a public meeting would hardly assist defendants in their planning options. It is well established that "equity would not require the doing of a 'vain or useless thing' " *Id.* at 458. Finally, the delay involved in scheduling a meeting would certainly hinder the Corps' work and thereby, harm defendants. Thus, in light of Congress' clear expression of public interest and the lack of injury to plaintiffs, the Court declines to issue an injunction.

The Court's decision, however, does not preclude defendants from re-evaluating their own conduct. The Court's failure to provide the extraordinary relief of an injunctive writ does not mean that defendants might not, on their own, decide to comply with their regulations. Indeed, although the Court will not require a public meeting, it urges defendants to conduct their own evaluation of the situation and to hold a meeting if they find that one may be reasonably scheduled.

VIII. CONCLUSION

The Court today finds that the defendants have failed to comply with their own regulations. Compliance would involve, at the very least, an opportunity for the public to comment, after due notice, on GDM Supp. No. 2 as well as other aspects of the proposed project. The Court has also ruled on plaintiffs' claims regarding deficiencies in the FEIS, and found that none of their allegations has merit. Court approval of the FEIS, however, should not be construed as approval of the project proposal contained in the FEIS. In preparing the document and in selecting a recommended plan, the Corps has been required constantly to choose between alternatives; plaintiffs have contended those choices were arbitrary or capricious or in violation of NEPA. As a part of its review of plaintiffs' allegations, the Court has found that the Corps did not act

arbitrarily or illegally. That finding is certainly not a judicial seal of approval for the choices which the Corps has made. Similarly, the Court's decision may not be construed as a finding that the alternatives which defendants have rejected are improper or unsound.

If defendants elect to hold a public meeting and to reconsider their final decision on Lock and Dam 26, they must receive public comments with an open mind. A public meeting after an agency has already made its decision would be an empty gesture. *National Tour Brokers Association v. ICC,* 591 F.2d 896 (D.C. Cir. 1978). Because the Court's decision today does not involve an assessment of the wisdom of the Corps' conduct, its approval of the FEIS would not interfere with either defendant's objectivity or the public's right to comment.

An order in accordance with the foregoing will be issued of even date herewith.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

Date: October 23, 1979.

Civil Action No. 74-1190
Civil Action No. 74-1191

FILED

OCT 23 1979

JAMES F. DAVEY, Clerk

EXHIBIT A

APPENDIX F

Filed September 10, 1979
James F. Davey, Clerk

UNITED STATES DISTRICT COURT

For the District of Columbia

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Plaintiffs,

v.

Civil Action No. 74-1190

CLIFFORD ALEXANDER, et al.,

Defendants.

IZAAK WALTON LEAGUE OF AMERICA, et al.,

Plaintiffs,

v.

Civil Action No. 74-1191

CLIFFORD ALEXANDER, et al.,

Defendants.

ORDER

Upon consideration of the entire record herein, and in accordance with the Memorandum Opinion of even date herewith, it is, by the Court, this 10th day of September, 1979,

ORDERED that defendants' Motion on the Non-Reviewability of Corps' Cost-Benefit Studies be, and the same hereby is, granted in part and denied in part, and it is

FURTHER ORDERED that counts I, II, IV, V, VI, VII & IX of plaintiffs' Amended Complaint be, and the same hereby are, dismissed, and it is

FURTHER ORDERED that the remaining counts are III, VIII, X, XI and XII.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

APPENDIX G

Filed September 10, 1979
James F. Davey, Clerk

UNITED STATES DISTRICT COURT

For the District of Columbia

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Plaintiffs,

v.

Civil Action No. 74-1190

CLIFFORD ALEXANDER, et al.,

Defendants.

IZAAK WALTON LEAGUE OF AMERICA, et al.,

Plaintiffs,

v.

Civil Action No. 74-1191

CLIFFORD ALEXANDER, et al.,

Defendants.

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

Defendants have moved to narrow the issues in this case on the eve of trial. Specifically, they have requested the Court to decline review of all aspects of the "cost/benefit" analysis performed by the defendant United States Army Corps of Engineers pursuant to the Water Resources Policy Act of 1965, 42 U.S.C. § 1962 et *seq.* and the Corps' planning regulations, 33 C.F.R. pts. 290-295 (1978). Because the Court is persuaded that defendants' motion has a limited veracity, it grants the motion in part and dismisses courts I, II, IV, V, VI, VII and IX of plaintiffs' Amended Complaint (filed December 11, 1978).

The Court's ruling, however, does not eliminate the issue of the propriety of defendants' cost/benefit analysis. By declining to dismiss court VIII, the Court holds that this analysis is subject to judicial review to determine its adequacy under the National Environmental Policy Act, § 101(b), 42 U.S.C. § 4331(b).

Generally, this Court's prior decisions have been limited to an examination of the adequacy of plaintiffs' claims under the National Environmental Policy Act. The Court has never discussed either the prima facie viability of the claims made under other statutes and regulations or the impact upon those claims of congressional authorization of Lock and Dam 26. A treatment of these issues is, of course, imperative before trial and the Court now turns its attention to that matter. The background of this litigation is fully set forth in the Court's three prior published opinions, 382 F.Supp. 610 (D.D.C. 1974) (granting a preliminary injunction and requiring congressional approval), 431 F.Supp. 772 (D.D.C. 1977) (dissolving the preliminary injunction without prejudice and upholding plaintiffs' right to seek review of the environmental impact statement), 459 F. Supp. 188 (D.D.C. 1978) (denying motions for summary judgment), and thus, need not be repeated here. One new fact, however, should be noted: on October 21, 1978, Congress accepted defendants' proposal and authorized the Secretary of the Army "to replace locks and dam 26, Mississippi River, Alton, Illinois, and Missouri, by constructing a new dam and a single, one-hundred-and-ten-foot by one-thousand-two-hundred-foot lock at a location approximately two miles downstream from the existing dam. . . ." Act of October 21, 1978, Pub. L. No. 95-502, § 102(a), 92 Stat. 1695.

In narrowing the scope of this case prior to trial, the Court relies upon fundamental differences between the National Environmental Policy Act ("NEPA") and the other statutes and regulations upon which plaintiffs' base their claims. In prior decisions, this Court has ruled that congressional approval of Lock and Dam 26 at Alton, Illinois, *see* Pub. L. No. 95-502,

92 Stat. 1693 (1978), did not preclude judicial review of the Environmental Impact Statement (EIS) submitted to Congress as part of the legislative proposal, Order of March 16, 1975. Indeed, after a careful review of the legislative record, the Court was drawn to the conclusion that Congress foresaw—and intended—the judicial scrutiny normally afforded EISs. *Id.*, slip op. at 5-6. The Court's holding in its Order of March 16, 1979, was fully consistent with its prior conclusion that plaintiffs' possessed standing to enforce NEPA's requirement that an EIS accompany "proposals for legislation," 42 U. S. C. § 4332(2)(c). *Atchison, Topeka and Santa Fe Railway v. Callaway,* 431 F.Supp. 722, 727 (D.D.C. 1977). (This type of EIS is commonly called a "legislative EIS.") Both holdings reflect the Court's belief that judicial review of legislative EISs does not involve undue interference with the legislative process. The EIS requirement was intended by Congress not merely as a legislative aid, but also "to provide detailed environmental information *to the public* to permit them to participate in a meaningful way in further decisionmaking both at the administrative and legislative levels." *Id.* at 727 (emphasis added). Thus, plaintiffs' interest in ensuring defendants' compliance with NEPA supports judicial review of all aspects of defendants' EIS.

Defendants' assertion that their cost/benefit analysis is so complex as to preclude judicial review is simply without merit. In *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission,* 449 F.2d 1109 (D.C. Cir. 1971), the court of appeals for this circuit indicated that EIS review may involve the "actual balance of costs and benefits" and that "[i]n some instances environmental costs may outweigh economic and technical benefits and in other instances they may not." *Id.* at 1113 & 1115. Moreover, in *County of Suffolk v. Secretary of Interior,* 562 F.2d 1368, 1384 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978), the Second Circuit held that a cost-benefit analysis attached to an EIS pursuant to 40 C.F.R. §1500.8(a)(8) (1978) was not immune from NEPA review.

This Court has previously indicated its approval of the Second Circuit's approach in *County of Suffolk, see Atchison, Topeka and Santa Fe Railway v. Callaway,* 459 F.Supp. 188, 192 (D.D.C. 1978) and in permitting cost/benefit review under NEPA the Court re-affirms that approval.

The Court's post-authorization review of cost/benefit analysis under NEPA, however, does not support the review of procedural or substantive errors under other statutes or regulations, when Congress intended those laws to serve a more limited purpose than NEPA. For example, the Eighth Circuit has held that a cost/benefit analysis prepared pursuant to 33 U.S.C. § 701a, the preamble to the Flood Control Act of 1936, was not reviewable to determine whether costs exceeded benefits, once Congress had approved the project proposed in the analysis. *Environmental Defense Fund v. Froehlke,* 473 F.2d 346, 356 (8th Cir. 1972). Evidently, the court construed section 701a as intended solely for the benefit of Congress and thus, once that body had exercised its judgment by accepting the proposal, judicial rejection of the underlying analysis would involve an unwarranted interference with the legislative process. Yet, although the court declined to review the cost/benefit analysis under the Flood Control Act of 1936, it pointed out that the "relief requested by the plaintiffs under § 701a is partially available under NEPA." 473 F.2d at 356. Because the district court would have to "determine whether the actual balance of costs and benefits struck by the agency" comported with the standards of NEPA, some examination of the analysis was appropriate. *Id.; accord, Environmental Defense Fund v. Corps of Engineers,* 492 F.2d 1123, 1134 (5th Cir. 1974). *See also* W. Rodgers, *Handbook on Environmental* Law § 7.5, at 746-747 (1977 ed.). In limiting the plaintiffs' cost/benefit claims to those under NEPA, this Court adopts a similar rationale. The judiciary should defer to congressional expertise in the weighing of costs and benefits, except where Congress has indicated that judicial scrutiny is appropriate. Plaintiffs rely upon only one statute which calls for the type of

scrutiny which they seek—NEPA. And under NEPA, the Court must examine the EIS in its entirety to determine its conformity with the legislative intent expressed in the statute. Plaintiffs' have not presented this Court with any evidence to support the conclusion that Congress intended the courts to engage in a similarly comprehensive examination to determine agency compliance with other laws and regulations after the legislature has studied and approved the proposals submitted in alleged conformance with those rules. In the face of this silence, the Court declines to intervene in this aspect of the legislative process. A review of the specific laws upon which plaintiffs rely fully supports this conclusion.

The Water Resources Planning Act of 1965, 79 Stat. 244, (the Act) creates an inter-agency Water Resources Council and directs the Council to establish "principles, standards, and procedures for ... the formulation and evaluation of Federal water and related land resource projects." 42 U.S.C. § 1962a-2 (1976) In 1973, the Council issued its *Principles and Standards for Planning Water and Related Land Resources* at 38 Fed. Reg. 24778-24868; two years later, the Corps adopted regulations set forth at 33 C.F.R. pts. 290-295 (1978), which were designed to implement these principles. The Water Resources Planning Act, however, is clearly designed with a less sweeping purpose than NEPA. By calling for the evaluation of certain projects, its primary goal is to provide the President and Congress with guidance in their planning efforts in the water resources field. *See* H. R. Rep. No. 169, 89th Cong., 1st Sess. 3 & 5 (1965). Because these guidelines are intended for the primary benefit of Congress and the President, approval of a recommended project by these lawmakers vitiates whatever claims a party may possess regarding the Corps of Engineers compliance with the Act and regulations thereunder. In this case, Congress has itself weighed the costs and benefits[1] and, by

[1] The legislative record of Pub. L. No. 95-502, 92 Stat. 1693 (1978), shows extensive consideration of all aspects of the

Footnote continued on next page.

authorizing construction, indicated its finding that the benefits exceeded costs, within the meaning of the Water Resources Planning Act. Once Congress has reached a decision on this matter, courts should decline to interfere with the legislative judgment. *Cf. Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527-528 (1941).[2] In contrast to NEPA, Congress did not envision continuing judicial review to determine compliance with the Act. *See* Order, Slip op. at 5-6 (March 15, 1979). Accordingly, the Court must dismiss Count V of plaintiffs' Amended Complaint because it calls for a substantive re-evaluation of the economic costs and benefits of the construction proposal to determine their adequacy under the Water

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Footnote continued from previous page.

Lock and Dam 26 proposal. *See* S. Rep. No. 95-215, 95th Cong., 1st Sess. (1977); H.R. Rep. No. 95-545 pt. 1, 95th Cong., 1st Sess. (1977); 124 Cong. Rec. S18,043-052 (daily ed. Oct. 23, 1978); *id.* H12,695-702; *Proposed Waterway User Charges and Replacement of Locks and Dam 26: Hearings on S. 712, S. 790 & S. 923 Before the Subcomm. on Water Resources of the Senate Comm. on Environment and Public Works,* 95th Cong., 1st Sess. (1977); *Replacement of Locks and Dam 26 at Alton, Illinois; Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation,* 95th Cong., 1st Sess. (1977); *Locks and Dam 26; Hearings on S. 1285, S. 3425 & S. 3506 Before the Subcomm. on Water Resources of the Senate Comm. on Public Works,* 94th Cong., 2d Sess. (1976).

[2] The Court finds further support for its holding in *Concerned Residents of Buck Hill Falls v. Grant,* 537 F.2d 29 (3d Cir. 1976). In that case, the Third Circuit held that a cost/benefit analysis prepared by the Soil Conservation Service in conjunction with one part of a four dam project, was properly subject to judicial review *after* a congressional committee had appropriated funds for the project. 537 F.2d at 34-35. The circuit court distinguished the case before it from the situation which is presented to this Court, where "Congress [has] *specifically authorized* the project[] after receiving and reviewing" the cost/benefit analysis and "after consideration of [the project's] economic merits." *Id.* at 35 (emphasis added).

Resources Planning Act. Count VII requires a similar substantive re-evaluation under 33 C.F.R. § 290.11(c), a regulation issued in accordance with the Water Resource Council's principles and standards; the Court must also dismiss that count. Counts I, IV and IX relate to the defendants' alleged failure to comply with various procedural requirements of the Act. All of the defects could have been—or were in fact—brought to the attention of Congress during the legislative process;[3] yet, Congress decided to accept the proposal despite the alleged noncompliance with the Water Resources Planning Act. The Court believes that congressional approval of the Lock and Dam 26 project is tantamount to a finding that these oversights either never occurred or were, for the purposes of the Act and its regulations, insignificant. It would certainly constitute an invasion of the legislative process for this Court to breathe new life into these allegations and then seek to determine their accuracy. Accordingly, counts I, IV and IX of the Amended Complaint shall be dismissed.

Plaintiffs' Amended Complaint contains two other counts which merit discussion. In count VI, plaintiffs complain that the Corps' inclusion of future delay charges as part of the transportation charges to traffic on the existing system violates section 7(a) of the Department of Transportation Act, 49 U.S.C. § 1656(a). This statute provides the Water Resources Council with authority to set up standards for the economic evaluation of water resource projects and also requires the Council to adhere to a statutory definition of the "primary direct navigation benefits" of such a project. Here again, the statutory and regulatory criteria are intended primarily for the benefit of the nation's lawmakers and they have already indicated their approval, under this statute, of the method used to evaluate the economic costs which plaintiffs seek to contest. It would be no less improper for the Court to re-scrutinize that decision than to re-examine the decisions previously discussed.

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[3] The legislative record is set forth at note 1 *supra*.

Finally, count II of the Amended Complaint alleges non-compliance with both section 122 of the River and Harbors Act of 1970, Pub. L. No. 91-611, 84 Stat. 1823, and the regulations issued pursuant to that statute. The Court, however, is persuaded that this statute was also intended to aid Congress alone in the evaluation of a particular construction project.[4] Congress having made the decision to build, the Court will not interfere with that decision to assess defendants' compliance with laws designed solely to assist the legislature.[5]

In sum, the Court holds that Congress intended NEPA to stand on a different footing from the other statutes upon which plaintiffs' rely. In contrast to other pre-authorization studies, legislative EISs are not designed solely for the benefit of lawmakers. Because Congress has declared that significant public interests are implicated in any decision affecting the environment, the Court must provide plaintiffs with an opportunity to challenge the adequacy under NEPA of the legislative EIS for Lock and Dam 26—notwithstanding congressional approval of the project.

In order to fully accomplish the objectives of NEPA, this review must include an examination of the defendants'

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[4] This conclusion is fully consistent with this Court's prior treatment of section 122 of the Rivers and Harbors Act of 1970, Pub. L. No. 91-611, 84 Stat. 1823. In issuing a preliminary injunction in 1974, the Court held plaintiffs' claims under this statute cognizable. *Atchison, Topeka and Santa Fe Railway v. Callaway,* 382 F. Supp. 610, 623 (D.D.C. 1974). However, this conclusion included a caveat: "[S]ince the requirements of Section[ ] 122 . . . are similar to those of NEPA, it is unnecessary at this stage to examine in depth the Plaintiffs' allegations in this respect. . . . " *Id.* Significantly, the Court recognized plaintiffs' claims under the statute *prior* to congressional authorization of Lock and Dam 26. Because legislative authorization signals acceptance by Congress, the party intended to benefit from the statute, it ends the need for judicial intervention.

[5] *See* note 2 *supra.*

cost/benefit analysis as sought by count VIII. Yet, even though the Court must review this analysis to determine its adequacy under NEPA, it need not scrutinize the same studies to determine their compliance with the Water Resources Planning Act or other statutes and regulations designed to assist Congress in evaluating the merits of a proposed construction project. Plaintiffs have not introduced—and the Court has not found—a shred of evidence to support the assertion that, with respect to these statutes other than NEPA, Congress intended the extraordinary remedy of injunctive relief from a district court. Compliance with, and enforcement of, these statutes is thus best left to the legislature.

Because defendants' pre-trial motion has been limited to counts I through X of the Amended Complaint, nothing in this opinion affects plaintiffs' right to proceed under count XI, involving the need for, or lack of, post-authorization studies by the defendants.

An order in accordance with the foregoing shall be issued of even date herewith.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

DATE: September 10, 1979

APPENDIX H

Filed October 4, 1978
James F. Davey, Clerk

UNITED STATES DISTRICT COURT

For the District of Columbia

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Plaintiffs,

v. C.A. No. 74-1190

HOWARD H. CALLAWAY, et al.,

Defendants.

IZAAK WALTON LEAGUE OF AMERICA, et al.,

Plaintiffs,

v. C.A. No. 74-1191

HOWARD H. CALLAWAY, et al.,

Defendants.

MEMORANDUM

In its Memorandum Opinion and Order of May 2, 1977, this Court denied defendants' and defendant-intervenors' motions to dismiss. 431 F. Supp. 722 (D.D.C. 1977). In denying these motions, this Court held that section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), requires the Corps of Engineers to submit an environmental impact statement (EIS) to Congress with its proposal for authorizing legislation for the construction of a replacement Lock and Dam 26. The Court further held that plaintiffs herein had a right of action and standing to challenge the adequacy of the EIS that defendants had prepared. Finally,

the Court held that plaintiffs' claim for declaratory relief as to the adequacy of the present EIS was sufficient to render the case justiciable.

After the motions to dismiss were denied, the parties filed a series of briefs with respect to plaintiffs' then pending motion for summary judgment. These briefs were quickly followed by an interim skirmish, a series of pleadings, and ultimately a hearing on the question of whether there *remained* before Congress a "proposal for legislation" by the Executive Branch with respect to Lock and Dam 26 at Alton, Illinois. On November 29, 1977, this Court concluded that such a proposal for legislation indeed remained before Congress and, accordingly, the Court directed the parties to focus once again on the plaintiffs' pending motion for summary judgment. Thereafter, the parties filed a second series of briefs on plaintiffs' motion for summary judgment and defendants and defendant-intervenors filed cross-motions for summary judgment. On June 2, 1978, the parties presented oral arguments on the pending summary judgment motions. The case is now before the Court on these cross-motions for summary judgment.

Plaintiffs' motion for summary judgment seeks a declaratory judgment that the Final EIS prepared by the Corps of Engineers to accompany the proposed authorizing legislation for Lock and Dam 26 is inadequate and fails to comply with the NEPA's requirements. Plaintiffs' motion also seeks a declaratory judgment that the Corps' decision to propose the authorizing legislation here in issue was arbitrary and capricious in light of the true costs and benefits of the proposed project. For the reasons hereinafter stated, the Court concludes that it cannot presently grant any of the pending motions for summary judgment with respect to the adequacy of the present EIS. However, the Court will grant defendants' and defendant-intervenors' motion for summary judgment with respect to plaintiffs' claim that the Corps' decision to propose authorizing legislation was arbitrary and capricious.

I. THE ADEQUACY OF THE EIS NOW BEFORE CONGRESS

As this Court stated in its 1977 opinion in this case, the question of whether the *adequacy* of an EIS for a legislative proposal can be reviewed by a court before Congress has acted on the proposal was an issue of first impression. Thus, in deciding whether the present EIS is adequate, the Court is without the guidance of other cases in which the adequacy of legislative proposal impact statements have been challenged. Assuming, without deciding, that the same standards for adequacy under NEPA govern legislative proposal EIS's as govern run-of-the-mill "Federal Action" EIS's, the Court concludes that material facts are presently in dispute that preclude the Court from granting any of the pending motions for summary judgment.

Plaintiffs' primary challenges to the present EIS are four: (1) the absence of programmatic/systemic analysis of the cumulative environmental impacts of the series of locks and dams and the navigation channel beginning at Alton and running upstream on the Illinois River; (2) the allegedly erroneous and unsupported calculation of benefits attributable to the proposed Lock and Dam 26 replacement; (3) the allegedly erroneous and unsupported projection of traffic increases and the absence of discussion of the attendant environmental impacts of such increases;[1] and (4) the allegedly insubstantial discussion of alternatives to the proposed project. At least with respect to the first three of these challenges, it appears that there are material issues of fact that are presently in dispute.

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[1] The allegedly erroneous and unsupported projection of traffic increases that will result from the building of the replacement Lock and Dam 26 is being challenged *both* because such projected traffic increases are essential to the calculation of the costs and benefits of the proposed project *and* because more sizeable traffic increases will have more severe environmental impacts on the waterway system.

A. The Programmatic Issue

With respect to the absence of programmatic/systemic analysis, there appear to be a number of threshold factual issues that are now in dispute. The Court recognizes, as do the parties, that the parameters of defendants' programmatic duties are defined in significant part by the Supreme Court's 1976 decision in *Kleppe v. Sierra Club,* 427 U.S. 390. In that decision, the Supreme Court held that "comprehensive" or programmatic impact statements, while undeniably appropriate in certain situations, do not necessarily have to analyze the environmental impacts of related projects that are merely "contemplated" rather than "proposed." 427 U.S. at 410 & n.20. The Court did not, however, explicate when during the course of the development of plans for Federal action an agency's planning becomes a "proposal" as distinguished from a contemplated action. *See* CEQ, *Memorandum on "Kleppe v. Sierra Club" and "Flint Ridge Development Co. v. Scenic Rivers Assn. of Oklahoma,"* (Sept. 16, 1977), *reprinted in* 42 Fed. Reg. 61,069, at 61,071 (Dec. 1, 1977); Note, *Program Environmental Impact Statements: Review and Remedies,* 75 Mich. L. Rev. 107, 117-18 (1976); Note, *The Scope of the Program EIS Requirement: The Need for a Coherent Judicial Approach,* 30 Stan. L. Rev. 767, 790 n. 117 (1978).

It appears to the Court that the parties presently dispute whether a series of locks and dams on the Illinois River and the so-called Cal-Sag III project are presently "proposed." The parties also appear to be in sharp disagreement as to whether a twelve-foot navigation channel is "proposed" for the Upper Mississippi and Illinois Rivers. Under *Kleppe,* the threshold determination that must be made is whether these projects are "proposed," and, while the determination may be a combined question of fact and law, the Court cannot make an appropriate determination in the absence of an adequate factual predicate. Since the present record before the Court does not contain sufficient undisputed facts to constitute an adequate factual

predicate, and since the parties disagree on the ultimate characterization of the aforesaid projects, it appears that summary judgment is inappropriate on the question of whether defendants acted arbitrarily in excluding programmatic/systemic analysis from the present EIS. Even if the parties were to stipulate that the aforestated projects were "proposals," summary judgment would still be inappropriate at this time on the programmatic issue in view of the apparent disputes between the parties on such threshold facts as the degree of interdependence of Lock and Dam 26 with the aforestated projects, the extent to which the several projects will have cumulative or synergistic effects, and the feasibility of meaningful programmatic analysis. *See Kleppe v. Sierra Club,* 427 U.S. at 411; CEQ Memorandum, *supra,* 42 Fed. Reg. at 61,071.

B. The Calculation of Benefits and the Projection of Traffic Increases Issues

Even a cursory look at the respective parties' pleadings and their Rule 1-9(h) Statements of Material Facts demonstrates that material facts remain in dispute with respect to plaintiffs' challenges to the adequacy if the impact statement's calculations and projections. Among the facts that appear to be in dispute are the accuracy and existence of record support for defendants' commodity forecasts, tonnage projections, and rate and delay savings that can be anticipated if the proposed replacement Lock and Dam 26 is constructed. Accordingly, it appears to the Court that summary judgment is not appropriate at this time with respect to plaintiff's challenge to the impact statement's calculations and projections (and the adequacy of the discussion of the environmental impacts thereof).

C. The Alternatives Issue

It does not appear to the Court that there presently exist disputes of material fact that are unique to plaintiffs' challenge to the adequacy of the EIS's discussion of alternatives. (This does not mean that no material facts are in fact disputed.)

However, it appears to the Court that the adequacy of the Corps' discussion of alternatives cannot be adjudged until the programmatic issues are resolved. It is for this reason that the Court finds that summary judgment is inappropriate at this time on this challenge also.

D. The Appropriateness of an Evidentiary Hearing

Defendants have suggested in their pleadings that any evidentiary hearing by this Court might be inappropriate. The Court is cognizant of the uncertainty that now exists with respect to the proper judicial role in reviewing impact statements for compliance with NEPA. Indeed, it appears that no definitive guidance has ever been provided to the federal trial courts with respect to whether their role in ensuring strict compliance with NEPA's procedural mandate is limited to review of the administrative record or whether their role includes fact-finding outside of the administrative record. This uncertainty has been compounded in recent years by the Supreme Court's decisions in *Kleppe v. Sierra Club, supra,* and in *Vermont Yankee Nuclear Power Corp. v. NRDC,* 98 S. Ct. 1197, 1215-17 (1978).

After extensive consideration of the pertinent authorities, this Court concludes that the appropriate role for the Court in this case is that articulated by the Second Circuit last year in *County of Suffolk v. Secretary of the Interior,* 562 F.2d 1368, 1384-85 (2d Cir. 1977), *cert. denied,* 98 S. Ct. 1238 (1978). In that opinion, the Second Circuit distinguished NEPA cases seeking review of the adequacy of impact statements from "ordinary suit[s] challenging nonadjudicatory, nonrulemaking agency action." *Id.* at 1384. Such "ordinary" judicial review suits seek "substantive review" of agency actions. In contrast, suits seeking review of the adequacy of EIS's seek to ensure compliance with the procedural requirements of a congressional enactment (NEPA) other than the APA. As the *County of Suffolk* Court said, "a primary function of the Court [in NEPA

cases] is to ensure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives." *Id.* Thus, the Second Circuit reasoned:

> A suit under NEPA challenges the adequacy of part of the administrative record itself—the EIS. Glaring sins of omission may be evident on the face of the statement, see, e.g., *Chelsea Neighborhood Associations v. United States Postal Service,* 516 F.2d 378 (2d. Cir. 1975); *Silva v. Lynn,* 482 F.2d 1282, 1283 (1st Cir. 1973). Other defects may become apparent when the statement is compared with different parts of the administrative record. See, e.g., *I-291 Why? Association v. Burns,* 372 F. Supp. 223 (D. Conn. 1973), *aff'd per curiam,* 517 F.2d 1077 (2d Cir. 1975). *Generally, however, allegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept "stubborn problems or serious criticism . . . under the rug." Silva v. Lynn,* 482 F.2d at 1285, *raise issues sufficiently important to permit the introduction of new evidence in the district court, including expert testimony with respect to technical matters, both in challenges to the sufficiency of an environmental impact statement and in suits attacking an agency determination that no such statement is necessary.*

Id. at 1384-85 (emphasis added) (footnotes omitted). As the *Suffolk County* Court further explained, evidence introduced by plaintiffs for the first time in the district court may be probative "insofar as it tend[s] to show either that the agency's research or analysis was clearly inadequate or that the agency improperly failed to set forth opposing views widely shared in the relevant scientific community." *Id.* at 1385.

In *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 787 (1976), the Supreme Court emphasized:

> NEPA's instruction that all federal agencies comply with the impact statement requirement—and with all the

> other requirements of § 102—"to the fullest extent possible," 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle.

Of course, in determining whether a federal agency has so complied with NEPA's procedural requirements "to the fullest extent possible," the reviewing court must be guided by the "rule of reason." *See, e.g., Concerned About Trident v. Rumsfeld,* 555 F.2d 817, 827 (D.C. Cir. 1976); *County of Suffolk v. Secretary of the Interior,* 562 F.2d 1368, 1378 (2d Cir. 1977), *cert. denied,* 98 S. Ct. 1238 (1978). But nothing inherent in this "rule of reason" standard precludes the reviewing court from considering facts outside the strict confines of the administrative record. Accordingly, for the reasons set forth by the Second Circuit in *Suffolk County,* the Court concludes that an evidentiary hearing is the appropriate means of resolving the material facts that are apparently in dispute in this case.[2]

II. THE CORPS DECISION TO PROPOSE AUTHORIZING LEGISLATION FOR LOCK AND DAM 26

In addition to challenging the adequacy of the EIS that was prepared to accompany defendants' legislative proposal, plaintiffs also challenge defendants' decision to make the proposal. According to plaintiffs, the costs of the proposed replacement Lock and Dam 26 so exceed the benefits that defendants' decision to seek authorizing legislation for the project was "arbitrary and capricious" within the meaning of

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[2] The Court wishes to emphasize that it does not intend to suggest that *only* the factual issues discussed herein are material and/or genuinely disputed. Only after the parties have focused clearly on which issues are in fact material, and only after the parties have made good faith efforts to stipulate to as many of such material issues of fact as possible will the Court be in a position to delimit the scope of the evidentiary hearing herein to specific factual issues.

section 10(e) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). Thus, plaintiffs ask this Court to engage in "substantive" review of the legislative proposal.[3]

Most courts that have considered the issue have held that agency decisions to take action on projects having a significant environmental impact may be reviewed substantively by the courts to ensure that the decision was not arbitrary and capricious. *See, e.g., Calvert Cliffs Coordinating Committee v. AEC,* 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Corp of Engineers,* 470 F.2d 289, 297-301 (8th Cir. 1972), *cert. denied,* 413 U.S. 931 (1973). *See also* Leventhal, *Environmental Decisionmaking and the Role of the Courts,* 122 U. Pa. L. Rev. 509, 527-29 (1974); W. Rogers, *Environmental Law,* § 7.5, at 741 n.23 (1977). However, just as no court has yet confronted the problem of reviewing a legislative-proposal EIS for adequacy, so too has no court yet ruled on whether an agency decision to propose legislation is subject to substantive judicial review. Thus, this case presents the Court with yet another issue of first impression.

In its 1977 opinion in this case, the Court held, *inter alia,* that defendants' preparation of a Final EIS to accompany the proposed legislation on Lock and Dam 26 was "final agency action" within the meaning of the APA. On this basis, this Court held that judicial review of the adequacy of the EIS was available under 5 U.S.C. §§ 701-06. At that time, however, the Court was not faced with, and expressed no opinion on, the question of whether plaintiffs could seek "substantive review" of defendants' decision to propose the legislation.

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[3] It is appropriate to emphasize that to the extent plaintiffs now or in the future seek substantive review of the defendants' actions, it is clear that judicial review, if any is appropriate, is limited to consideration of the administrative record. Thus, any evidence adduced for the first time in the evidentiary hearing contemplated by section I of this opinion would be irrelevant to any substantive review under the well-established "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A).

The Court recognizes that the Corps' decision to propose legislation could be read to be "final agency action" under a broad reading of 5 U.S.C. §§ 551(13), 701-06. The Court further recognizes that since neither NEPA nor its legislative history contain "clear and convincing evidence" of Congress' intent to deny judicial review of agency decisions to propose legislation likely to have significant environmental impacts, it could be argued that the APA provides for judicial review of such agency decisions. *See Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41 (1967).

Notwithstanding the foregoing, the Court believes that there can be no doubt that judicial review of agency decisions to propose legislation would be inappropriate, and this Court will not engage in such review in the absence of compelling precedent for such judicial intervention in the legislative process. In its 1977 opinion, this Court indicated that it did not believe that declaratory relief as to the adequacy of a legislative-proposal EIS would interfere with the legislative process; this Court emphasized at that time that it "would never so interfere with the legislative process." 431 F. Supp. at 727 n.5. The declaratory relief plaintiffs now seek as to whether the Corps' decision to propose authorizing legislation was arbitrary and capricious invades the traditional province of Executive discretion, *cf. Laird v. Tatum,* 408 U.S. 1, 16-17 (1972); *Curran v. Laird,* 420 F.2d 122, 131 (D.C. Cir. 1969) (en banc) (Leventhal, J.), and may have a chilling effect on the legislative process. For these reasons, the Court concludes that the Corps' decision to propose authorizing legislation for a replacement Lock and Dam 26 is not subject to judicial review, and the Court will grant defendants' and defendant-intervenors' motions for summary judgment on this claim.[4]

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[4] In so ruling, the Court does not intend to foreclose plaintiffs from seeking substantive review of subsequent Corps' action with respect to the replacement of Lock and Dam 26. In

Footnote continued on next page.

III. SUMMARY

In conclusion, the Court will deny the cross-motions for summary judgment with respect to the adequacy of the Final EIS prepared by the Corps of Engineers to accompany its proposal of legislation authorizing the construction of a replacement Lock and Dam 26. The Court finds that an evidentiary hearing is appropriate and necessary to resolve apparently disputed issues of material facts with respect to this issue. The Court will, however, grant defendants' and defendant-intervenors' motion for summary judgment with respect to plaintiffs' claim that the Corps' decision to propose legislation was arbitrary and capricious.

An Order in accordance with the foregoing will be issued of even date herewith.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

DATE: October 3, 1975

Footnote continued from previous page.

other words, if Congress enacts authorizing legislation for a replacement Lock and Dam 26, and if the Corps decides to construct a replacement lock and dam after such legislation is enacted, then it *may* be appropriate for plaintiffs to seek judicial review under the authorities set forth in the text at page 10, supra, of the Corps' decision to commence construction. The Court expresses no opinion at this time as to whether such post-legislation substantive review would be appropriate; nor does the Court intend this opinion to suggest that any other issues may or may not be appropriate for judicial resolution if and when Congress enacts authorizing legislation.

APPENDIX 1

Filed May 2, 1977
James F. Davey, Clerk

UNITED STATES DISTRICT COURT

For the District of Columbia

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Plaintiffs,

v. C.A. No. 74-1190

HOWARD H. CALLAWAY, et al.,

Defendants.

IZAAK WALTON LEAGUE OF AMERICA, et al.,

Plaintiffs,

v. C.A. No. 74-1191

HOWARD H. CALLAWAY, et al.,

Defendants.

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

I. INTRODUCTION

This case is before the Court on defendants' and defendant-intervenor's motions to dissolve the preliminary injunction and to dismiss. The Court also has before it plaintiffs' motion for summary judgment which, *inter alia* (*see* note 3 *infra*), seeks a declaratory judgment that the Corps of Engineers' final environmental impact statement fails to comply with the requirements of section 102(2)(C) of the National Environmental Policy Act [NEPA], 42 U.S.C. § 4332(2)(C).

As hereinafter set forth, the Court concludes that since *construction* on the project here in issue is neither imminent nor a reasonably foreseeable likelihood, the Court's outstanding preliminary injunction is appropriately dissolved, without prejudice to a renewed request by plaintiffs for the same or similar relief in the future when and if such relief becomes appropriate. The Court further concludes that plaintiffs have a right of action and standing to enforce section 102(2)(C)'s EIS requirement for legislative proposals, and the "effectiveness" of the declaratory relief sought by plaintiffs, if granted by the Court, is sufficient to render this case justiciable. Accordingly, the Court will grant the motions to dissolve the preliminary injunction, but will deny the motions to dismiss and will therefore direct the defendants and defendant-intervenors to respond to plaintiffs' pending motion for summary judgment.

II. BACKGROUND

The present posture of this case is as follows: On September 6, 1974, this Court held that plaintiffs had demonstrated that they were likely to prevail at trial in their contentions that (1) the then proposed Locks and Dam 26 project was required to be authorized by Congress pursuant to 33 U.S.C. § 401 (1970), and Congress had not authorized the building of the proposed Locks and Dam 26, and (2) the defendants had not complied with section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C). *Atchison, Topeka and Santa Fe R.R. Co. v. Callaway,* 382 F. Supp. 610 (D.D.C. 1974). Accordingly, the Court issued a preliminary injunction restraining defendants from constructing the proposed Locks and Dam 26 until defendants complied with 33 U.S.C. § 401 and NEPA.

Subsequent to the issuance of that preliminary injunction, the defendants restudied the original proposal for Locks and Dam 26. In August 1975, the District Engineer in St. Louis completed a draft supplemental EIS and an updated economic analysis. He recommended that the present Locks and Dam 26 be replaced with a new dam containing two locks, each 110 feet

wide and 1,200 feet long, at a site approximately two miles downstream from the present location. After the Lower Mississippi Valley Division Engineer concurred, the Chief of Engineers asked the Board of Engineers for Rivers and Harbors to review all actions associated with Locks and Dam 26. The Board recommended, *inter alia:*

> (1) That approval be obtained from Congress to proceed immediately toward construction of a new dam and 110-foot by 1,200-foot main lock at a location approximately two miles downstream of the existing Locks and Dam 26.
>
> (2) That the operational need and economic justification of a second lock be recognized at this time, and that the design and construction of the dam provide for future expansion.
>
> (3) That . . . additional economic and environmental studies . . . be undertaken immediately, and that the findings and recommendations concerning a second lock be forwarded to Congress for approval.

Report of Board of Engineers for Rivers and Harbors, at vi (February 1976).

On March 15, 1976, the Chief of Engineers issued his report to the Secretary of the Army with regard to Locks and Dam 26. This report substantially adopted the recommendations of the Board of Engineers, and was accompanied by a draft EIS. The revised draft EIS and an economic formulation were then circulated to interested states, federal agencies, and others for comment.

On April 22, 1976, after receiving the report of the Chief of Engineers, Secretary of the Army Martin R. Hoffman concluded that in light of the

> proposed report recommending Congressional authorization of a different project, continuation of the prior approval is unnecessary and also may be the cause of some misinterpretation. Accordingly, I hereby terminate, effective this date, the above cited approval to construct the replacement project for Locks and Dam 26.

> I await [the] final report on the replacement project and the results of the full review it will have undergone. I have informed the appropriate Committee Chairman of this action and of my intention to submit my recommendations, whatever they may be, to Congress for its consideration.

Memorandum from the Secretary of the Army to the Chief of Engineers (April 22, 1976).

Finally, on August 24, 1976, Secretary Hoffman formally recommended to Congress in a "Letter of Transmittal" that it "authorize the construction of a replacement dam and 1200-foot lock" and that it *not* authorize an auxiliary lock "until such time as the interagency study indicates that such lock should be constructed." Along with the Letter of Transmittal, Secretary Hoffman forwarded to Congress proposed legislation, which would implement his recommendations, and a Final Environmental Impact Statement.

III. IN LIGHT OF SECRETARY HOFFMAN'S WITHDRAWAL OF AUTHORIZATION FOR THE ORIGINAL LOCKS AND DAM 26 PROJECT AND HIS SUBMISSION OF AUTHORIZING LEGISLATION TO CONGRESS FOR THE REVISED LOCK AND DAM 26 PROJECT, THE COURT WILL DISSOLVE ITS PRELIMINARY INJUNCTION.

The preliminary injunction issued by this Court in September 1974 restrained the defendants from commencing construction on the proposed Locks and Dam 26 project until they had complied with the applicable federal laws. The proposed project then in issue had been authorized by the Secretary of the Army; however, Secretary Hoffman expressly terminated that construction authority in April 1976. Thus, the original proposal is no longer viable. The new Lock and Dam 26 proposal has been submitted to Congress for approval,[1] and

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[1] The parties use the term Lock and Dam 26 (rather than the plural Locks and Dam 26) to describe the Department's new proposal for authorization of a single lock.

there appears to the Court to be no likelihood of any construction on the proposal until Congress enacts legislation authorizing such construction. Therefore, the preliminary injunction restraining construction is entirely unnecessary to ensure that plaintiffs do not suffer irreparable injury.

Under these circumstances, since there is no imminence, or even a reasonably foreseeable likelihood, of *construction, cf. Two Guys from Harrison-Allentown, Inc. v. McGinley,* 366 U.S. 582, 589 (1961), the Court concludes that it would be an appropriate exercise of its equity jurisdiction to dissolve the existing preliminary injunction restraining construction. "There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have arisen." *System Federation No. 91, Ry. Employees' Dept. v. Wright,* 364 U.S. 642, 647 (1961). *See Consolidated Edison Co. v. FPC,* 511 F.2d 372, 378 (D.C. Cir. 1974).

Of course, the dissolution of this preliminary injunction will be without prejudice to plaintiffs should they seek the same or similar relief in the future when and if such relief becomes appropriate.

IV. THE COURT WILL DENY DEFENDANTS' MOTIONS TO DISMISS: SECTION 102(2)(C) REQUIRES THE CORPS OF ENGINEERS TO SUBMIT AN ENVIRONMENTAL IMPACT STATEMENT TO CONGRESS WITH ITS PROPOSAL FOR AUTHORIZING LEGISLATION FOR THE CONSTRUCTION OF LOCK AND DAM 26, AND PLAINTIFFS HAVE A RIGHT OF ACTION AND STANDING TO ENFORCE THAT REQUIREMENT, AND THEIR CLAIM IS JUSTICIABLE.

Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), "directs that, to the fullest extent possible . . . all agencies of the

Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement. To comply with this mandate and with the Corp of Engineers' own implementing regulation, which specifically requires the preparation of an EIS for "[r]ecommendations or reports to the Congress for legislation affecting Corps of Engineers programs including proposals to authorize projects (survey, review, and authorization reports) and other legislation, exclusive of appropriations," 33 C.F.R. § 209.410(e)(1) (1976);[2] *see also* 40 C.F.R. §§ 1500.5(a)(1), 1500.12 (1976), defendants prepared a final EIS which they submitted to Congress along with the proposed legislation. Plaintiffs now seek a *declaratory judgment* that this final EIS is *inadequate* and does not satisfy the requirements of section 102(2)(C).[3]

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[2] It is well-settled that the Department is bound by its own regulations. *See* Concerned About Trident v. Rumsfeld, No. 75-1515, Slip op. at 13 (D. C. Cir. Oct. 13, 1976).

[3] Plaintiffs, in their pending motion for summary judgment, also seek: (1) a declaratory judgment that the Corps of Engineers' use of 33 U.S.C. § 5 as authority for constructing new navigation facilities of larger dimensions is illegal and in violation of 33 U.S.C. § 401; (2) a declaratory judgment that the Corps has violated 42 U.S.C. § 1962-2 by failing to analyze sufficiently alternative transport modes; and (3) a permanent injunction against construction of any new Lock and Dam 26 structure until the errors in the final EIS are corrected. The Court concludes, however, that, in light of the present posture of the Lock and Dam 26 proposal, neither of the non-NEPA claims for declaratory judgment are presently ripe for adjudication, and the claim for permanent injunctive relief based on the alleged NEPA violation is clearly inappropriate at this time. *See* section II, *supra*. Thus, only if plaintiffs' NEPA claim for declaratory relief presents a "case or controversy" and is justiciable can the Court refuse to dismiss the case and subsequently proceed to the merits.

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Defendants argue that "[s]ince the Secretary of the Army has committed that Department to take no action toward [the reconstruction of Locks and Dam 26] unless expressly authorized by Congress," and since Congress has not yet authorized any such construction, "there is, at this time, no case or controversy which is subject to judicial review, nor is there any effective relief which this Court could conceivably grant."[4] Similarly, defendants argue that plaintiffs have no standing to challenge the adequacy of the final EIS since they suffer no "injury in fact" as a result of the Secretary's action in proposing legislation. The essence of defendants' argument is that a court can *never* review the adequacy of an EIS for a legislative proposal unless and until Congress takes action on the proposal.

This issue is apparently one of first impression; no case of which the Court is aware has addressed the question of whether the adequacy of an EIS for a legislative proposal can be reviewed by a court before Congress has acted on the proposal. In fact, surprisingly few cases have even considered whether the total failure of an agency to prepare an EIS for a legislative proposal can be challenged. The majority of the cases that have considered the question have held, though without substantial analysis, that an agency's failure to prepare any EIS for a legislative proposal can be reviewed by a court at the behest of a private plaintiff. *See, e.g., Sierra Club v. Morton,* 395 F. Supp. 1187 (D.D.C. 1975), *appeal docketed,* No. 75-1781 (D.C. Cir. Sept. 9, 1975); *Environmental Defense Fund v.*

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Of course, *if* the Court ultimately determines and issues a declaratory judgment, on the merits, that the Corps' final EIS does not comply with section 102(2)(C), and *if* Congress ultimately authorizes the construction of the proposed Lock and Dam 26 *without* exempting the project from NEPA, then plaintiffs could seek from this Court an injunction to restrain construction until defendants had fully complied with NEPA.

[4] Federal Defendants' Supplemental Memorandum of December 28, 1976, at 4.

TVA; 339 F. Supp. 806 (E.D. Tenn.), *aff'd,* 468 F.2d 1164, 1181-82 (6th Cir. 1972). *See also* F. Anderson, *The National Environmental Policy Act,* in Federal Environmental Law, at 331-35 (E. Dolgin & T. Guilbert ed. 1974). However, one case in this district recently held that section 102(2)(C) "was designed solely to aid the Congress and was not intended to create a right of action in a private party to claim injury in some fashion from the ongoing legislative process." *Wingfield v. Office of Management and Budget,* Civil Action No. 77-489, Transcript at 6 (D.D.C. April 4, 1977), *appeal docketed,* (D.C. Cir. April 4, 1977).

Upon careful consideration of section 102(2)(C), the policies underlying its enactment, and the numerous cases that have analyzed the purposes of the EIS requirement for "recommendation[s] and report[s] for ... other major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), the Court concludes that (1) the section 102(2)(C) EIS requirement for legislative proposals is enforceable by a private right of action, and that private right of action includes challenges to the adequacy of as well as to the absence of an EIS; (2) plaintiffs in the present case have standing to maintain such a challenge to the adequacy of the EIS for the proposed legislation authorizing the construction of Lock and Dam 26; and (3) this case is justiciable in that the Court has the power to enter a declaratory judgment as to the adequacy of the EIS and such a judgment would provide effective relief to the plaintiffs.

In ruling that the section 102(2)(C) EIS requirement for legislative proposals was not enforceable by a private right of action, the *Wingfield* court emphasized that

> Congress has within its own investigatory and other resources ample means to obtain from the Executive whatever information it desires relating to environmental impact prior to taking action. It is clear, of course, that Congress did not intend to stultify itself by this legislation

> [NEPA] if at any point it was satisfied it had enough information to proceed in a given situation.

Wingfield, supra, Transcript at 4.[5] The Court does not doubt that Congress imposed the EIS requirement for proposed legislation to ensure that all agencies would provide Congress with detailed environmental information that could be considered by the legislators along with the agencies' proposals for legislation. The Court concludes, however, that the EIS

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[5] One significant difference between *Wingfield* and the instant case is that plaintiff Wingfield sought to enjoin various agencies and departments from transmitting recommendations to Congress before an EIS was prepared. He also sought to enjoin the Secretary of the Interior from testifying before the House Committee on Interior and Insular Affairs. Of course, such relief would have interfered substantially with the legislative process. This Court agrees with that decision that, in the absence of express legislative direction, it should not be inferred from section 102(2)(C) that Congress so intended "to stultify itself." This Court would never so interfere with the legislative process. In the instant case, on the other hand, plaintiffs seek no relief that would in any way interfere with the legislative process.

In fact, the declaratory relief sought by plaintiffs, if ultimately granted by the Court, would likely aid the legislative process. First, it would enable interested parties, both governmental and nongovernmental, to participate more fully and effectively in the process. Second, it would enable the Congress to know before voting on the authorizing legislation whether the final EIS complies with NEPA, as interpreted by the courts. In that way, Congress will be informed before and when it votes as to whether it is necessary to consider exempting the proposal from NEPA's EIS requirement. While this second "aid" to the legislative process would probably not, standing alone, render plaintiffs' claim cognizable as a "case or controversy," there is no reason why, in a case such as the present where there is an established "case or controversy," the courts should not recognize that one effect of the EIS requirement for legislative proposals is to advise the Congress of the legal status of the legislation under consideration.

requirement, *both* on "proposals for legislation" *and* on "other major Federal actions," was also intended by Congress to provide detailed environmental information to the public to permit them to participate in a meaningful way in further decisionmaking both at the administrative and legislative levels. In this way, NEPA was intended to ensure that both Congress and the public will be advised of the predicted consequences of the proposed legislation and the alternatives thereto, and they will therefore be able to act responsibly thereon.

This interpretation of section 102(2)(C) is supported by substantial precedent. *See, e.g., Sierra Club v. Morton,* 510 F.2d 813, 819 (5th Cir. 1975); *Trout Unlimited v. Morton,* 509 F.2d 1276, 1282 (9th Cir. 1974); *Silva v. Lynn,* 482 F.2d 1282, 1285 (1st Cir. 1973). Thus, the district court in *Environmental Defense Fund v. TVA,* 339 F. Supp. at 810, said with regard to the EIS requirement for proposed legislation:

> The purpose of a section 102(2)(C) detailed environmental impact statement is (1) to aid the agency's decision-making process and (2) *to advise the public of the environmental consequences of the proposed action.* The requirement seeks to insure that each agency decision-maker has before him, and takes into proper account, all environmental impacts of a particular project. Only if this is done will the most intelligent, optionally beneficial decision be likely to result. Moreover, the detailed statement provides evidence that these factors have been taken into account. *More importantly, it allows those removed from the decision-making process to evaluate and balance the factors on their own.* (Emphasis added.)

The Court of Appeals for this Circuit has also given express recognition to the important role that an EIS plays in informing the public of environmental information concerning proposals for major Federal actions. In *Jones v. District of Columbia Redevelopment Land Agency,* 499 F.2d 502 (D.C. Cir. 1974), plaintiffs challenged the failure of defendants District of Columbia Redevelopment Land Agency (RLA), National Capital

Planning Commission (NCPC), and U.S. Department of Housing and Urban Development (HUD) to comply with section 102(2)(C) in formulating and executing urban redevelopment plans. The decisionmaking process for the redevelopment plans in question required (1) RLA to submit a proposed program to NCPC for adoption or modification; (2) if NCPC approved the proposal, the plan would then be submitted to the District of Columbia City Council which decides whether to empower RLA to submit the proposal to HUD; (3) HUD would then decide whether or not to fund the proposal. The particular focus of the Court of Appeals' consideration was whether section 102(2)(C) required RLA to prepare an EIS to accompany its proposal to NCPC. The court concluded that RLA's submission was itself "a proposal for federal action requiring an environmental impact statement." 499 F.2d at 510. The court reasoned as follows:

> The federal defendants argue, however, that to require RLA to submit an environmental impact statement to NCPC together with its action year plan would be inefficient, since NCPC may well modify the plan and thus render RLA's impact statement an anachronism. But, in our view, this argument proves too much. Indeed, it radically misconceives the purposes of the impact statement requirement. Such statements were not to be merely *post hoc* environmental rationalizations of decisions already fully and finally made. Rather their purpose is to ensure "meaningful consideration of environmental factors at all stages of agency decision making," *and to inform both the public and agencies implicated at subsequent stages of decision-making of the environmental costs of the proposal.* Thus, it is precisely because NCPC has the power to modify RLA's action year proposals that impact statements accompanying the proposals are necessary. NCPC's decision on whether to approve the proposals as presented or to modify them may be, and should be, vitally affected by the information contained and the conclusions drawn in RLA's impact statements. *Equally important, perhaps, the public will be afforded an opportunity prior to NCPC's decision, to inform it of data and views contrary to those*

> *submitted by RLA, thus ensuring that NCPC's own environmental impact statement will be premised on the fullest possible canvassing of environmental issues, and that environmental factors will be taken into account before the action year plans take on the perhaps irreversible momentum of NCPC approval.*

499 F.2d at 510-11 (emphasis added). This decision is particularly apposite to the present case in that the NCPC—the agency-recipient of the RLA impact statement—acts in a quasi-legislative capacity in determining whether to approve the RLA proposal.

This interpretation of section 102(2)(C) leads the Court to conclude that the requirement of an adequate EIS for legislative proposals can be enforced by a private right of action. It is beyond peradventure that the requirement of an adequate EIS for "other major Federal actions" is enforceable by a private right of action. *See* F. Anderson, NEPA in the Courts 16-23 (1973). Although *Wingfield* concludes that no corollary right of action exists to enforce the EIS requirement for legislative proposals, and while defendants contend that at least the *adequacy* of an EIS for a legislative proposal cannot be challenged by a private action pending congressional consideration of the proposal, this Court can discern no such distinction between the two EIS requirements of section 102(2)(C). Neither the language of section 102(2)(C) itself nor the purposes served by the two types of EIS suggests that Congress intended to distinguish between the two requirements.

Moreover, in the absence of an express legislative directive to the contrary, this Court must presume that judicial review of the defendants' alleged failure to comply with NEPA's EIS requirement is available to plaintiffs: Judicial review of final agency action is presumptively available under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06 (1976). *See Dunlop v. Bachowski,* 421 U.S. 560, 567 (1975); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41 (1967); L. Jaffe,

Judicial Control of Administrative Action 372-76 (1965). Section 10(c) of the APA, 5 U.S.C. § 704, states that "final agency action for which there is no adequate remedy in a court [is] subject to judicial review." In the present case, there can be no doubt that an agency's failure to prepare an adequate EIS in accordance with section 102(2)(C) is "agency action" for purposes of the APA. *See* 5 U.S.C. § 551(13). Finally, the Supreme Court has indicated that such action is "final" and hence subject to review. As the Court said in *Kleppe v. Sierra Club,* 427 U.S. 390, 406 n.15 (1976):

> [T]he time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement. This is the point at which an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption.

On the basis of all the foregoing, this Court concludes that the defendants' alleged failure to prepare an adequate EIS as required by section 102(2)(C) is subject to judicial review.[6]

The Court further concludes that plaintiffs herein are proper parties to seek such judicial review by a private action. Section 10(a) of the APA, 5 U.S.C. § 702; provides that

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[6] While the APA creates the right to judicial review of the defendants' action, it is now settled that the APA is not itself jurisdictional. *See* Califano v. Sanders, 97 S.Ct. 980 (1977). Although this Court's jurisdiction has not been challenged, it is worthwhile to note that jurisdiction in this case is clearly conferred by 28 U.S.C. § 1331(a), *as amended by* Public Law No. 94-574, 90 Stat. 2721 (Oct. 21, 1976), *without* regard to the amount in controversy. There can be no doubt that this case "arises under" both NEPA and the APA, and it is clear that Congress considered cases such as this as "appropriate matters for the exercise of Federal judicial power regardless of the monetary amount involved." Califano v. Sanders, *supra,* 97 S.Ct. at 985 n.7, *quoting* S. Rep. No. 94-996, 94th Cong., 2d Sess. 12 (1976).

persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute" are "entitled to judicial review thereof." As concluded above, one major purpose of the EIS requirement for legislative proposals (and for other major Federal actions) is to provide the public with information about the environmental impacts of proposed projects to permit meaningful participation by interested parties in the decisionmaking processes. Plaintiffs herein are indisputably interested in participating in the legislative consideration of the proposed authorizing legislation for Lock and Dam 26, and accordingly they are "adversely affected" and "aggrieved" by the defendants' alleged failure to prepare and to make available an adequate EIS. Thus, pursuant to 5 U.S.C. § 702, plaintiffs are *entitled* to judicial review of the agency's alleged failure to prepare an adequate EIS to accompany its proposed legislation.[7]

The Court also concludes that plaintiffs herein have alleged sufficient "injury in fact" to satisfy the constitutional "case and controversy" limitations on standing. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). Defendants' alleged failure to prepare an adequate EIS in accordance with section 102(2)(C) would have an adverse effect on plaintiffs' ability to participate in the legislative process by denying them access to important environmental information about the proposed construction of Lock and Dam 26. A comparable allegation of injury to various plaintiffs' "informational interests" was held to be sufficient to confer standing by the Court of Appeals for this Circuit in *Scientists' Institute for Public Information, Inc., v.*

[7] As the Supreme Court held in Aberdeen and Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II), 422 U.S. 289, 319 (1975): "NEPA does create a [discrete] procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal actions *and a right of action in adversely affected parties to enforce that obligation.*" (Emphasis added.)

AEC, 481 F.2d 1079, 1087 n.29 (D.C. Cir. 1973). As that court reasoned,

> Any other approach to standing in the context of suits to enforce compliance with NEPA for [proposals] not yet resulting in injury to discrete economic, aesthetic or environmental interests would insulate administrative action from judicial review, prevent the public interest from being protected through the judicial process, and frustrate the policies Congress expressed in NEPA, a result clearly inconsistent with the Supreme Court's approach to standing.

Id. Cf. Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d at 512. In other words, NEPA creates "a statutory right or entitlement to environmental information," and the alleged deprivation of such information clearly confers on plaintiffs "standing to sue even where the plaintiff[s] would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. at 514.

Finally, the Court concludes that this case is justiciable in that the Court is capable of molding "effective relief for resolving this case." *Powell v. McCormack*, 395 U.S. 486, 517 (1969). Plaintiffs herein seek a declaratory judgment as to the adequacy of the final EIS. As the *Powell* Court made clear,

> The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that a district court may "declare the rights * * * of any interested party * * * whether or not further relief is or could be sought. . . . [A] request for declaratory relief may be considered independently of whether other forms of relief are appropriate.

395 U.S. at 517-18 (citations omitted). Thus, there can be no doubt that this Court has the power to issue a declaratory judgment as to the adequacy of the final EIS here in question. There can also be no doubt that such a declaratory judgment would provide effective relief to the plaintiffs. While most cases challenging the absence or the adequacy of EIS's have sought both declaratory and injunctive relief, the Court of Appeals for

this Circuit has at least twice affirmed that declaratory relief alone is sufficient to enforce NEPA's EIS requirement. *See Scientists' Institute for Public Information, Inc. v. AEC,* 481 F.2d at 1082 n.1; *Jones v. District of Columbia Redevelopment Land Agency,* 499 F.2d at 512. Certainly the Court can assume that if it determines that the final EIS here in issue is inadequate, then the defendants would correct the deficiencies in the EIS "without the coercion of a court order." *Dunlop v. Bachowski,* 421 U.S. at 576. *See also National Treasury Employees Union v. Nixon,* 492 F.2d 587, 616 (D.C. Cir. 1974).

V. CONCLUSION

For the reasons stated herein, the Court concludes that the preliminary injunction entered on September 6, 1974 should be dissolved at this time, without prejudice to a renewed request by plaintiffs for the same or similar relief in the future when and if such relief becomes appropriate. The Court further concludes that NEPA requires the Corps of Engineers to submit to Congress with its proposal for legislation authorizing construction on the proposed Lock and Dam 26 a final EIS that complies with the requirements of section 102(2)(C). The Court further concludes that plaintiffs have a right of action and standing to enforce this EIS requirement. Finally, the Court concludes that plaintiffs' claim for a declaratory judgment renders the case justiciable. Accordingly, the Court will deny the motions to dismiss and order the defendants and defendant-intervenors to respond to plaintiffs' pending motion for summary judgment.

An Order in accordance with the foregoing will be issued of even date herewith.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

DATE: May 2, 1977

APPENDIX J

Filed September 6, 1974
James F. Davey, Clerk

UNITED STATES DISTRICT COURT

For the District of Columbia

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

Plaintiffs

v.

HOWARD H. CALLAWAY, ET AL.

Defendants

Civil Action Nos. 74-1190, 74-1191

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

This case is before the Court on Plaintiff's Motion for a Preliminary Injunction to prevent the Defendants from constructing a 3.2 billion dollar Upper Mississippi River Navigation System and its first component, Locks and Dam 26, located at Alton, Illinois.

On August 6, 1974 two actions were filed in this Court by the Izaak Walton League of America, et. al. and the Atchison, Topeka and Santa Fe Railway Company, et. al.[1] against Howard H. Callaway, Secretary of the Department of the Army, the Army Corps of Engineers, and Lieutenant General William G. Gribble, Chief of Engineers, Department of the

[1] The other Plaintiffs consist of twenty, Midwestern railroads, the Sierra Club of America, and the Illinois branch of the Izaak Walton League.

Army. On the same day, United States District Judge Howard F. Corcoran issued a temporary restraining order prohibiting the letting of bids for the proposed Locks and Dam 26. On August 20, 1974, this Court granted the Plaintiffs' Motion to Consolidate the two cases and a hearing was held on the Motion for a Preliminary Injunction. This Court is now faced with the important task of deciding questions of national importance in that they involve a substantial environmental, economic, and social impact upon the entire inland waterway system of the midwestern United States, and the manner by which similar projects in other parts of the nation will be handled in the future by Congress and the Army Corps of Engineers.

I. BACKGROUND

Locks and Dam 26 is one of a series of locks and dams extending from Alton, Illinois to St. Paul, Minnesota. Together, these twenty nine locks and dams make commercial traffic possible on the Upper Mississippi River and the Illinois Waterway. Locks and Dam 26, however, as the Defendants have recognized, is the piviotal [sic] crossroads of this river complex. This is because it is the first locks and dam to the Upper Mississippi River and serves as the gateway of all commerce. This is not an overstatement. Locks and Dam 26 is a key intersection affecting the total inland waterway system of America's breadbasket. All traffic from the Upper Mississippi River and Illinois Waterway must pass through these locks on its way west on the Missouri River, east on the Ohio River, and south on the Lower Mississippi River.[2]

The existing Locks and Dam 26 was originally authorized by Congress in the 1930's and was operational by 1938. At the

[2] The following map from the Final Environmental Impact Statement on Locks and Dam 26 shows the Mississippi Inland Waterways System and the proposed project site at Alton, Illinois. See page 2A [following opinion] for map.

present time, it has fallen into an alleged state of deterioration. In 1968, in recognition of the condition of the structure, a report prepared by the Army Corps of Engineers was submitted to the Board of Engineers for Rivers and Harbors and the Secretary of the Army recommended that a new structure, located two miles downstream, be built to replace the existing facility. Agency approval was given in 1969, and in 1970 Congress appropriated funds for planning. A Survey Report and a General Design Memorandum were prepared, followed by a Draft Environmental Impact Statement. In 1974, a Final Environmental Impact Statement was released. And, after hearings before both the House and Senate Subcommittees on Appropriations (Public Works), Congress, on August 15, 1974, appropriated over twenty-two (22) million dollars for the project.[3] This money, say the Defendants, will go to the construction of a coffer dam,[4] the first major step toward the building of a new Locks and Dam 26. This will take over nine months. The entire structure will not be completed for at least eight years, although the Defendants admit that it will probably be closer to eleven years before the entire facility is operational.[5] The total cost of the project has been estimated by the Defendants to be over 383 million dollars.[6]

II. ISSUES

The gravamen of the Plaintiffs' claim is that the proposed Locks and Dam 26 is merely the first step in a multi-billion dollar project to rebuild the Upper Mississippi River System without specific authorization from Congress in violation of 33

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[3] This appropriation was part of a general appropriations bill passed by the House of Representatives on August 13, 1974 and by the Senate on August 15, 1974.

[4] A coffer dam is an enclosure from which water is pumped thereby exposing the bottom of the river to permit construction.

[5] *See,* Final Environmental Impact Statement, Locks and Dam 26, at 3 (i.ii.i).

[6] Id., at 2, 11.

U.S.C. § 401.[7] Specifically, the Plaintiffs maintain that the Army Corps of Engineers intends to rebuild the entire system because 1.) the dramatic increase in size and capacity of the new Locks and Dam 26 will so affect the other structures that it will necessitate their rebuilding, 2.) the life expectancy of the entire system, not just Locks and Dam 26, is nearing its end and, 3.) the Corps in other documents, specifically the Upper Mississippi River Comprehensive Basin Study of 1970 (Appendix J), has indicated that the building of a new Locks and Dam 26 will require numerous other structures, or modification of existing structures, in order to cope with the increased capacity.

Plaintiffs further claim that the Army Corps of Engineers has violated Section 209 of the Rivers and Harbors Act of 1970,[8] in that the Corps 1.) ignored the objectives of national

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[7] Section 401 provides that:

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits if a single State, provided the location and plans thereof are submitted to and approved by Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

[8] 42 U.S.C. § 1962-2.

economic development and environmental protection, 2.) improperly and inadequately assessed the benefits and costs of the project and, 3.) failed to consider feasible alternatives. Coupled with the above claim, Plaintiffs allege that the Army Corps of Engineers has also violated Section 122 of the Rivers and Harbors Act of 1970[9] by not examining possible adverse economic, environmental, and social effects of the project. And, finally, the Plaintiffs assert that the National Environmental Policy Act of 1969 (hereinafter NEPA)[10] has been abridged because the Army Corps of Engineers has insufficiently analyzed and assessed the environmental impact of the proposed Locks and Dam 26 and the system-wide rebuilding. It is Plaintiffs claim that the Corps has illegally attempted to segment the system so as to facilitate its justification and to hide its true intent to rebuild the system from the Congress and the public. Furthermore, Plaintiffs state that the Corps has transgressed the mandates of NEPA by: failing to disclose the data used to prepare the Environmental Impact Statement (hereinafter EIS), thereby impeding public and Congressional scrutiny of the project, using unrealistic and outdated data and thereby rendering the EIS analysis and assessment arbitrary and capricious and because it fails to analyze alternatives or their environmental impact.

The Defendants contest these claims and allege that the proposed rebuilding of Locks and Dam 26 does not need the consent of Congress, but rather is specifically permitted by 33 U.S.C. § 5.[11] The Defendants, in the alternative, maintain that

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[9] Pub. Law 91-611, 84 STAT. 1823 (1970).

[10] 42 U.S.C. § 4321 *et seq.*

[11] 33 U.S.C. § 5 provides in pertinent part that:

> [F]or the purpose of preserving and continuing the use and navigation of said canals and other public works without interruption, the Secretary of the Army, upon the recommendation of the Chief of Engineers, United States Army, is authorized to draw his warrants of requisitions,

Footnote continued on next page.

even if Section 5 were found to be inapplicable, recent Congressional appropriations are sufficient, albeit implied, authorization for a new Locks and Dam 26. The Defendants strongly protest that this is not a multi-billion dollar project encompassing numerous structures, but rather, is singular in nature, even though they admit that other projects are being considered. In response to the alleged violations of Section 122 and 209 of the Rivers and Harbors Act of 1970, the Defendants argue that Section 122 is inapplicable because the project was authorized prior to the enactment of the statute thereby exempting the project from its requirements and that, regardless of this technicality, the Corps has given adequate treatment to the factors contained in Sections 122 and 209.

The Defendants also dispute the claimed violations of NEPA on the grounds that the plaintiffs have not borne their burden of proving a lack of reasonable, good faith compliance and that the EIS is sufficient because the alleged omissions were

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Footnote continued from previous page.

> from time to time, upon the Secretary of the Treasury to pay the actual expenses of operating, maintaining, and keeping said works in repair, which warrants or requisitions shall be paid by the Secretary of the Treasury out of any money in the Treasury not otherwise appropriated: *Provided,* That whenever, in the judgment of the Secretary of the Army, the condition of any of the aforesaid works is such that its entire reconstruction is *absolutely essential* to its efficient and economical maintenance and operation as herein provided for, the reconstruction thereof may include such modifications in plan and location as may be necessary to provide adequate facilities *for existing navigation: Provided further,* That the modifications are *necessary to make the reconstructed work conform to similar works previously authorized by Congress* and forming a part of the same improvement, and that such modifications shall be considered and approved by the Board of Engineers for Rivers and Harbors, and be recommended by the Chief of Engineers before the work of reconstruction is commenced. . . (Emphasis added)

considered and discussed in an appropriate manner and because the Corps had a right to omit certain information as beyond the scope of reasonable concern.

III. DISCUSSION

A. THE PROPOSED LOCKS AND DAM 26 AT ALTON, ILLINOIS, REQUIRES THE CONSENT OF CONGRESS UNDER 33 U.S.C. § 401 AND MAY NOT BE BUILT WITHOUT AUTHORIZATION UNDER 33 U.S.C. § 5.

In order to decide whether Congressional consent is required, the relationship between 33 U.S.C. §§ 5 and 401 must be examined and understood. Under the latter Section, Congressional consent is required before the commencement of construction of *any* dam or other structure in a navigable river of the United States.[12] The word *any*, in regard to this case, is crucial. On its face, Section 401 would appear to prohibit the building of any structures, even by the Federal government, without prior Congressional approval. However, Section 5 permits the Army Corps of Engineers to entirely reconstruct a dam or other structure, that is to build a dam or other structure in place of an existing structure, without the consent of Congress when, due to its condition, reconstruction is "absolutely essential" to its efficient and economical maintenance and operation, and further permits the Corps to make modifications in plan and location as "may be necessary to provide adequate facilities for existing navigation." Thus the word *any* in Section 401 is qualified by Section 5, to the extent that the criteria of Section 5 are met. A critical distinction can, therefore, be drawn between reconstruct [sic] under Section 5 and what may be characterized as rebuilding under Section 401, the latter

[12] While the original purpose of Section 401 was to assert the federal power over the nation's waterways so as to prevent obstructions to navigation by states and private parties, it has been held to apply to the Federal government. *See, United States* v. *Arizona.* 295 U. S. 174. (1935).

term being a designation for those replacement structures which do not meet the criteria of Section 5.

The Defendants would have this Court hold that since the present Locks and Dam 26 is considered by the Corps to be obsolete, its replacement is within the ambit of Section 5, requiring no specific authorization.[13] This argument hinges on the word "existing" in Section 5. It is the Defendants' contention that this term encompasses future traffic needs since it would be illogical for Congress to allow for a structure that would be obsolete on the drawing board. While this Court agrees that Congress did not legislate planned obsolescence, the agency's position must be rejected as there are compelling reasons that it is wrong. *See, Wilderness Society* v. *Morton,* 479 F.2d 842, 865 (D.C. Cir. 1973).

What the Defendants have failed to appreciate is the consequence of their position. If the Army Corps of Engineers can replace any existing structure merely because it considers it to be obsolete, than not only would there be no distinction between Sections 5 and 401, but also there would be raised the specter of an unlawful delegation of legislative power. The plain meaning of Section 5 prohibits this Court from adopting the Defendants' interpretation. Section 5 is essentially a maintenance provision. *It does not give the Corps a right of replacement in perpetuity.*[14] Section 5 permits a reconstruction only when it is "absolutely essential", and only allows a modification in plan and location when it is necessary to meet the needs of "existing" navigation. The clear meaning of the Section is that the Corps may *replace* a structure which has

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[13] The Defendants maintain that the facility must be considered obsolete because it is experiencing structural deterioration and has reached its capacity to adequately serve the present and future traffic needs of the Upper Mississippi River System.

[14] Cf., *Northwest Paper Co.* v. *F.P.C.,* 344 F.2d 47, 50-51. (8th Cir. 1965).

become ineffective or damaged, but may not *rebuild* a structure merely to meet expected future increases in traffic. In essence, only Congress can authorize such a project.[15]

The Defendants argue that Section 5 should be given a broader interpretation. They contend that this is possible if the word "existing" is interpreted to include future traffic. The word "existing" in the statute, however, connotes the present and not the future. This is its plain meaning and there is no legislative history to the contrary. Although this may appear to the Defendants as unduly restrictive, when Section 5 is read in conjunction with Section 401, it is apparent that all the Corps has to do to build a new structure to replace one that has allegedly become obsolete is to obtain the consent of Congress. It is understandable that Congress reserved such a decision to itself as in many instances it would entail, as does the instant matter, considerations which would substantially affect the environment, the economy, and the society of the nation. The Corps has admitted that this is "the largest construction project

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[15] The Commission on Organization of the Executive Branch has been critical of the Corps' expanded interpretation of Section 5. Commenting on a project similar to the proposed Locks and Dam 26, the Commission stated:

> "The Locks proposed to be installed are not replacements, but constitute a new navigation improvement program for these rivers. The Ohio River project locks of low lift by 3 dams having locks of lift equivalent to the existing 9. Although the project channel depths are authorized for 9 feet, the new locks will provide for at least 12-foot depths. The issue which we raise is not as to the engineering soundness of the project, but as to the authority of the Corps of Engineers to proceed without specific authorization. No decision of a court or opinion of the Department of Justice is cited to support the construction of this statute. While the statute authorizes the Corps of Engineers to replace or reconstruct obsolete or worn-out works, it is stretching it too far to find in it authority to proceed with such programs as are contemplated on the Ohio and Warrior-Tombigbee."

in the history of the mid-west." EIS at 138. It is impossible for this Court to believe that Congress would permit the decision to proceed to be made by the Corps and not by Congress.

It must be recognized that there is a discernible line between *reconstructing* and *rebuilding*. It can be ascertained by determining whether the proposed structure represents a material change in the character and capacity of the existing structure. In the case of *Gulf, C.&S.F. Ry. Co. v. Meadows*, 56 Tex. Civ. App. 131, 120 S.W. 521, 524 (Civ. App. Tex. 1909) a Texas court stated:

> Appellant in its pleadings and brief claims that it was repairing an old bridge, but the truth of the matter is that it tore down an old wooden bridge, and placed in its stead a new steel structure. It was engaged in the construction of a new bridge as much so as though no other bridge had spanned the river. It would not matter when the original bridge was constructed, whether before or after the enactment of the federal statute, when it undertook to build a new bridge of different construction and different material, it was subject to the provisions of Section 401.

Thus it may be said that one of the basic factual questions in this case is whether the proposed structure is one of *"wood"* or one of *"steel"*. Since this is on motion for a preliminary injunction, the Plaintiffs must show that there is a likelihood that they will prevail on the merits in their contention that the proposed structure is of the latter type.

B. THE PLAINTIFFS HAVE SHOWN A LIKELIHOOD THAT THEY WILL PREVAIL ON THE MERITS UNDER SECTION 401.

As previously stated, the standard for determining if the proposed Locks and Dam 26 is a reconstruction or a rebuilding is whether the proposed structure represents a material change in the character and capacity of the existing structure. The Plaintiffs have adduced sufficient evidence to convince this Court that it is likely that they will prevail on their allegation that the Defendants have violated 33 U.S.C. § 401.

First, the Plaintiffs have clearly shown, and, the defendants have admitted, that the character and capacity of the proposed Locks and Dam 26 will be substantially increased. The present "practical capacity" of the existing structure is 46.2 million tons.[16] The proposed structure will accommodate 190 million tons.[17] While the design of the new structure will be similar to the existing one, the depth and dimensions will be increased to create a greater "practical capacity".[18] There is, however, a dispute as to the depth of the channel. The Corps maintains that it will be nine feet[19] whereas other agencies and the Plaintiffs claim that it will be twelve feet.[20] While this Court is willing to accept the Corps representations, it is cognizant of the fact that the twelve foot channel has been and still is under considerations.[21] And, as the record reveals, the character of the proposed structure makes it amenable to such a change.[22]

Second, the Plaintiffs have met their burden on the issue of whether this is a singular or systemic rebuilding. This Circuit has refused to accept *post hoc* rationalizations of agency action and will scrutinize the record to determine its true intention.

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[16] EIS at 3.

[17] Id. at 4.

[18] *Id.* at 5, 136-37. "Practical capacity", as this Court understands the term, means the amount of traffic, in tons, that can pass through the Locks without undue delay in the course of one year.

[19] The Defendants point specifically for support to the discussion at page 137 of the EIS.

[20] The Plaintiffs, in support of their contention, emphasize, *inter alia,* that the General Design Memorandum No. 2 proposal was for a twelve foot channel. GDM at 2-1. Further, they point to the letter of Assistant Secretary of the Interior Nathanial P. Reed, dated August 5, 1974, to Secretary of the Army Howard H. Callaway, which reveals Interior Department concern that the Corps intends to construct an unauthorized twelve foot channel.

[21] EIS at 14.

[22] *Id.* at 137-38.

See, *Scientists Inst. For Pub. Info., Inc. v. A.E.C.* 481 F.2d 1079, 1095 (D.C. Cir. 1973). While in its representations to the Congress and in its responses to comments in the Final EIS the Corps rejected the contention that it is undertaking a system-wide improvement project, the record is replete with contrary indications.

In the Final EIS the Corps has conceded that: "Few water resource projects compare in scope and extent with this project, and its construction must be considered a major expenditure of public funds."[23] The Defendants maintain that this refers only to the proposed Locks and Dam 26. While this is arguable, its meaning is illuminated by the following statement from the Draft EIS:

> "There are at present some constraints to the realization of this prediction in that other locks in the system would be overloaded before such tonnages could be reached". Thus, considering the impact of the project under existing conditions—that is, utilizing the other existing locks and dams in the system—the tonnages that could be shipped on the upper Mississippi River and Illinois River would be constrained to present capabilities of other locks in the system. To be able to carry the amount of cargo forecast will necessitate alteration or replacement of other locks and dams in the system.
>
> The construction of replacement Locks and Dam No. 26 will, therefore, create impetus to revise other portions of the system to create the most efficient utilization of the added capacities of Locks and Dam No. 26.[24]

Upon a thorough reading of the EIS and the General Design Memorandum No. 2 (hereinafter GDM), this Court has found even subtler indications too numerous and complex to recount. An example will suffice. In Exhibit 15, Sheet 4 of the GDM appears a conclusion that the twenty-one footh [sic]

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[23] *Id.* at 179.

[24] Draft EIS at Three-18. A similar statement appears in the GDM at A-17.

depth of the proposed lock chamber will provide for a twelve-foot navigation channel. But, to the contrary, in the EIS it is stated that a twenty-one foot depth in the lock chamber is insufficient to accomodate [sic] continuous traffic which requires a twelve-foot navigation channel, although such traffic could be passed through the locks with some delay. The Corps would have this Court conclude that the twelve-foot channel has therefore been rejected and that no system-wide improvements to such effect are contemplated by the proposed Locks and Dam 26. This contention is unworthy of belief in light of the following reasons. First, most of the traffic at present and in the near future does not require a twelve-foot channel. Second, those that do would not disrupt the flow of commerce to such an extent that the proposed structure must be considered an isolated improvement. And, third, as this Court has already noted, the structure is conducive to the eventual accomodation [sic] of continuous traffic requiring a twelve-foot channel. Furthermore, the Plaintiffs have also shown that they are likely to prevail upon their contention that the proposed Locks and Dam 26 is *not* "absolutely essential". The record reveals that while the existing structure may be said to be deteriorating, "remedial measures have been accomplished to correct the more serious deficiencies."[25] And, more importantly, it has been shown that the existing structure can be refurbished so as to extend its life for fifty years at an estimated cost of 100 million dollars,[26] compared to the 383 million for the new structure. The Corps claims that a new structure is still absolutely essential because of the present delays in passing traffic through the Locks. These present delays, however, have been shown to be easily remedied.[27]

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[25] EIS at 3.

[26] *Id.* at 150. The capacity, however, would remain at its present level.

[27] See, Affidavit of Dr. Joseph L. Carroll. The true concern of the Corps is the future delays created by the existing structure.

Upon a careful examination of the voluminous record presented to date in this case, it is the conclusion of this Court that the Plaintiffs have successfully demonstrated that they are likely to prevail upon their contention that the proposed Locks and Dam 26 is in violation of 33 U.S.C. § 401.

C. THE PROPOSED LOCKS AND DAM 26 HAS NOT BEEN AUTHORIZED BY CONGRESS EVEN THOUGH CONGRESS HAS APPROPRIATED FUNDS FOR THE PROJECT.

As this Court has found that the Defendants cannot rely on 33 U.S.C. § 5, the issue remains whether Congress has approved the proposed rebuilding of Locks and Dam 26.

The Defendants argue that because Congress has appropriated funds for the project, it has therefore given its consent. The Defendants, however, in the hearings before Congress and in all of their public documents, including the EIS, have continually asserted that this is a Section 5 project which does not need specific congressional authorization.[28] What in essence the Defendants now argue is that Congress ignored these assertions and authorized the project under Section 401. Such a contention is not only unpalatable, but is also erroneous as a matter of law. While some legislators did question under which statute the Defendants were proceeding,[29] they had a right to rely on the Defendants representations that this was a Section 5 project. For, legislators voting for appropriations have the right to assume that the agency had been following and will follow the law. *See, E.D.F.* v. *Froehlke,* 473 F.2d 346, 355 (8th Cir. 1972).

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[28] *See,* Statements of Colonel Hall before the Senate Subcommittee of the Committee on Appropriations, October 13, 1969, p. 6803; EIS at 2; GDM at 1-1.

[29] *See,* Statement of Senator Allen J. Ellender, Chairman, Subcc nmittee of the Committee on Appropriations, October 13, 1969, at 6802-3.

This Court cannot agree that the mere appropriation of funds meets the statutory requirement for Congressional consent under Section 401.[30] It is a general principle that Congress cannot and does not legislate through the appropriation process. This principle has been codified in Rule XXI of the Manual of the House of Representatives, which provides in pertinent part:

> 2. No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless on continuation of appropriations for such public works or projects as are already in progress.

Thus, an authorization bill would be necessary at the least for Congressional consent under Section 401. And, Locks and Dam 26 would not come under the exception since it is not a project already in progress. On this point, House Rule § 836 must also be considered:

> Previous enactment of items of appropriation unauthorized by law does not justify similar appropriations in subsequent bills unless if through appropriations previously made a function of the government has been established which would bring it into the category of continuation of works in progress.

Furthermore, the fact that no point of order was raised to the recent appropriation is not indicative of authorization, nor on the basis of § 836 can the previous appropriations provide such

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[30] The Defendants' reliance on *Orlando v. Laird,* 443 F. 2d 1039 (2d. Cir. 1971) is misplaced. Although the Second Circuit did reject the appellant's contention that "congressional authorization (for the Viet Nam war) cannot, as a matter of law, be inferred from military appropriations," it held that the manner by which Congress declared was a political question. *Id.* at 1043. Moreover, this Court can find no support for the Defendants' position that appropriations are sufficient authorization in this matter in the *Laird* opinion.

an indication. Therefore, this Court concludes that the proposed Locks and Dam 26 does not have the "consent" of Congress under 33 U.S.C. § 401.[31]

D. THE DEFENDANTS HAVE VIOLATED THE ENVIRONMENTAL POLICY ACT OF 1969, 42 U.S.C. § 4321 ET SEQ., BY NOT PREPARING A "DETAILED STATEMENT" ENCOMPASSING THE SYSTEMATIC IMPACT RESULTING FROM THE REBUILDING OF LOCKS AND DAM 26.

The National Environmental Policy Act of 1969, 42 U.S.C. § 4332 requires that agencies of the Federal government consider the impact of an overall program and not just isolated aspects of facilities.[32] A restricted impact analysis is prohibited because it "would frustrate the vitality of NEPA by allowing piecemeal decisions."[33] Thus, an agency may not engage in segmentation, i.e. "an appraisal of each tree to one of the forest."[34]

A bone of contention in this case has been whether the rebuilding of Locks and Dam 26 represents the first step in a system-wide improvement of the Upper Mississippi River and

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[31] This Court is also of the opinion that 42 U.S.C. § 1962d-5 may not have been complied with in this matter. That Section requires that *any* water resource development project over ten (10) million dollars (first cost) be approved by resolutions of the Committees of the House and Senate on Public Works. The parties have not shown that such resolutions were or were not passes. [sic] However, since this Court has found that Section 401 has not been complied with, a determination of this issue is not necessary for a decision on the motion for a preliminary injunction.

[32] *See, Scientists Institute for Public Information* v. *A.E.C.*, 481 F. 2d 1079, 1086-7 (D.C. Cir. 1973).

[33] *Sierra Club* v. *Froehlke*, 359 F. Supp. 1289, 1323 (S.D. Tex. 1973).

[34] *Jones* v. *Lynn*, 477 F. 2d 885, 891 (1st Cir. 1973).

the Illinois Waterway. While it has already been found that the Plaintiffs are likely to prevail upon this assertion, there is an additional reason why this Court must conclude that the Defendants have been guilty of segmentation.

The concept of segmentation encompasses more than prohibiting the mere artificial division of the program, it also requires that the Courts guard against an agency's considering only the immediate impact of the first step in a program.[35] The intent of Congress was to have NEPA effect the earliest deliberations of proposed actions.[36] Therefore, even though future action has not been finalized, if it is envisioned then the the agency must consider the impact of subsequent actions in furtherance of the program. In the instant case, the proposed Locks and Dam 26 will provide for more than a tripling of the amount of traffic on the Upper Mississippi and the Illinois Waterway. Yet, the Final-EIS includes an analysis of only the immediate and local impact of the project. This is so despite the fact that the Corps concedes that due to the increased capacity of the proposed structure other locks and dams in the system will require at least modification or rebuilding. This Court must therefore conclude that the Defendants have violated NEPA by failing to prepare a detailed statement encompassing the systematic impact resulting from the rebuilding of Locks and Dam 26.

This is not to say that the Corps must prepare a complete impact statement now for all future action that it intends to take in furtherance of the program. Rather, the Corps must identify and analyze the environmental impact the proposed structure and increased traffic will have on the entire Upper Mississippi River system and Illinois Waterway. The Defendants, however, argue that studies are being performed on this subject, and that on the basis of present information it is believed that

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[35] *See, Indian Lookout Alliance* v. *Volpe,* 345 F. Supp. 1167, 1170 (S.D. Iowa 1972).

[36] *See, Scientists Institute, supra* at 1087-88.

there will be little risk of environmental damage, and that unexpected environmental effects from increased traffic can be controlled or eliminated. While this may be true, none of this was included in the EIS and, more importantly, none of the data on which these statements and conclusions are based is set forth in the EIS for congressional and public scrutiny. What the Defendants fail to comprehend is that the rule against segmentation requires government agencies to recognize the interrelationship of environmental effects at the formative stage.[37]

The Defendants argue that even though there may be a cumulative environmental impact, segmentation is permissible since Locks and Dam 26 meets the test set forth in the recent case of *Sierra Club v. Callaway,* Doc. No. 73-2745, August 26, 1974. (Wallisville Project). The Fifth Circuit Court of Appeals in determining whether the Wallisville Project was a component, increment or first segment of the larger Trinity River Project, stated that the issue of segmentation should be decided on a case by case basis considering the factors of the scope of the project, the timing of the project, and the interdependence of the project to the overall program. While these are not the only factors to consider in this case, upon an application of the factors set forth in the Wallisville case, this Court finds that Locks and Dam 26 is not susceptible to a segmented analysis.

First, the Corps has stated openly that the proposed Locks and Dam 26 is the largest project undertaken in the midwest and will cost over 383 million dollars—a major expenditure of public funds to say the least. The decision to expand the capacity of this part of the Upper Mississippi River Navigation System, which includes the Illinois Waterway, from 46 to 190 million or more tons is, in essence, the decision to expand the capacity of the entire system. It is this decision that will necessitate the improvement of other segments of the system. Thus, Locks and Dam 26 is to the other parts of the Upper

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[37] *Id.*

Mississippi system what the Trinity River Project is to the Wallisville Project, not visa-versa.

Second, the proposed Locks and Dam 26 is just on the verge of implementation as opposed to the Wallisville Projects which is near completion. Despite this fact, the Defendants argue that this case is similar to Wallisville in that not only has Congress not appropriated funds for the other segments but also they will take at least fifty years to complete. And, they add that sementation [sic] in this case is essential because the structural integrity of the existing Locks and Dam 26 is in doubt making it a priority project. This Court is not persuaded that these are sufficient reasons to allow segmentation. While it is true that Congress has not appropriated funds, the proposed structure, as the Corps admits in the Final EIS, will necessitate system-wide improvements. Further, the rebuilding of Locks and Dam 26 itself will take approximately a decade, and will therefore require that the existing structure be maintained until it will be replaced. The Corps implores that they be allowed to replace the structure and will later examine its systemic impact. This is exactly what NEPA seeks to prevent!

While this Court has sufficiently dealt with the question of interdependence in its discussion of the previous issues, one further comment is necessary. This Circuit, in *Scientists Institute supra* at 1087, noted that:

> Individual actions that are related either geographically or as logical parts in a chain of contemplated action may be more appropriately evaluated in a single program statement.

This perception is particularly applicable in this case. Although it is conceivable that no further improvements of the Upper Mississippi River system may occur, the fact that [sic] are expected requires a present evaluation of their future impact.[38]

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[38] If this Court were to scrutinize the proposed Locks and Dam 26 in a vacuum, then it would have to conclude that the

Footnote continued on next page.

This Court cannot allow the Defendants on the one hand to segment the project and ignore the systemic impact and on the other cite as the justification for the increased capacity of the proposed structure the need for expansion of the capacity of the entire system.

E. THE DEFENDANTS HAVE VIOLATED NEPA BY FAILING TO ADEQUATELY CONSIDER ALTERNATIVES TO THE PROPOSED ACTION AND BY FAILING TO DISCLOSE ESSENTIAL DATA

In order to determine whether the EIS demonstrates an adequate assessment of alternatives to the proposed action, this Court has sought to ascertain the primary purpose of the project.[39] Although the Defendants have focused upon the deteriorating condition of the existing structure so as to bring the project within 33 U.S.C. § 5, it is the conclusion of this Court that the primary purpose is to expand the facility's capacity to meet the expected increase in traffic on the Upper Mississippi River and Illinois Waterway.[40]

Even though the primary purpose is expansion, the EIS restricted its consideration of alternatives to "no action", different types of construction, and changes in location.[41] The only references in the EIS to the possibility of other modes of transportation meeting the expected increase in traffic of goods are the conclusory statements that: railroads and other forms of

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Footnote continued from previous page.

Plaintiffs are likely to prove that the environmental injury so outweighs the benefits of the expanded structure as to make the agency's decision to proceed arbitrary and capricious.

[39] *See, Sierra Club v. Froehlke,* 359 F. Supp. 1289, (S.D. Tex. 1973).

[40] An examination of the entire record reveals that this is the avowed purpose. For example, see EIS at 4. See also, *Upper Mississippi River Comprehensive Basin Study* (1970) Table J-32.

[41] *See,* EIS at 149-170.

transportation could not handle the increase in traffic of goods, especially grain, would require greater public investment, would cost more to shippers, would, by stifling industrial growth, have an adverse economic and social effect on the region, and would require greater energy consumption in light of the projected availability of fuels.[42]

While this Court is not in a position to agree with or dispute the merits of these conclusions, neither is the Congress nor the public since the data on which they were based and the agency's reasoning process were not included in the EIS. This is contrary to the policy of NEPA, which has been called an "environmental full disclosure law." *E.D.F. v. Corps,* 325 F.Supp. 728, 759 (E.D.Ark.1971) What the lack of disclosure in this case does is to prohibit review by masking the reasons upon which the initial choice has been made between rebuilding or relying on existing structures and alternative modes of transportation. This is a clear violation of NEPA. *See, Committee to Stop Route 7 v. Volpe,* 346 F. Supp. 731 (D.C. Conn. 1972).

Upon an examination of the EIS, this Court must conclude that it fails to adequately consider feasible alternatives. It is apparent to this Court that this is another case in which the agency has limited its consideration to only those alternatives that it can adopt. *See, N.R.D.C. v. Morton,* 458 F.2d 827 (D.C. Cir. 1972). Such violations of both the letter and spirit of NEPA can not be tolerated.

F. THE ALLEGED VIOLATIONS OF SECTIONS 209 AND 122 OF THE RIVERS AND HARBORS ACT OF 1970 ARE COGNIZABLE BY THIS COURT.

As it has been found that the proposed Locks and Dam 26 has not been authorized by Congress, this Court holds that Section 122 of the Rivers and Harbors Action [sic] of 1970 does apply to the proposed project. However, since the

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[42] *Id.* at 150-52.

requirements of Sections 122 and 209 are similar to those of NEPA,[43] it is unnecessary at this state in the proceedings to examine in depth the Plaintiffs' allegations in this respect as this Court has found NEPA to have been violated.

G. THE INJUNCTION MUST ISSUE AS FEDERAL STATUTES HAVE BEEN VIOLATED AND THE PLAINTIFFS HAVE SHOWN LIKELIHOOD OF SUCCESS AND IRREPARABLE HARM.

When, as in the present case, federal statutes have been violated, it has been the long standing rule that a court should not inquire into the traditional requirements for equitable relief. *See, United States v. City and County of San Francisco,* 310 U.S. 16 (1940) While this Court is bound by that rule, there are other compelling reasons that the injunction should issue.

First, this Court is concerned with the analytical harm to NEPA.[44] The Congressional policy underlying that statute is that agencies which propose major federal action consider the national environmental and societal interest. Since NEPA has been violated, this Court cannot allow the proposed Locks and Dam 26 project to proceed until the agency properly determines the reasonable alternatives, and thus where the national interest lies.

Second, the Plaintiffs have shown not only that they are likely to succeed on the merits but also that they will suffer irreparable harm which outweighs any injury the Defendants would bare. If the proposed project is not consented to by Congress, then the injury to the environment, which the Defendants admit will occur, will be needless. Further, the Plaintiffs Railroads, being already in a tenuous financial position, would be unnecessarily harmed, perhaps even collapse, if

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[43] See text accompany notes 8 and 9.

[44] *See, Jones v. D.C. Redevelopment Land Agency,* 6 ERC 1534, 1539-40 (D.C. Cir. April 26, 1974).

the unauthorized expansion of the Upper Mississippi River and Illinois Waterway is allowed to proceed.

And finally, this Court is sensitive to the fact that the public interest lies with both parties. On the one hand, the public is concerned with maintaining the environment as well as the existence of the numerous midwestern railroads, and on the other, with the traffic delays and structural integrity of the existing Locks and Dam 26 as well as the free flow of commerce up and down the Upper Mississippi River and Illinois Waterway. Moreover, the public is concerned with the economic and social effect on the region. Having considered these interests, it is the opinion of this Court that the injunction must be granted. The project will be delayed only until the Defendants obtain the consent of Congress and cure the defects in the EIS. This will take a relatively short period of time considering that just the building of the new Locks and Dam 26 will take at least a decade, and until then the existing structure will have to be maintained.

An Order in accordance with the foregoing has been issued on the 5th day of September, 1974.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

September 6, 1974

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Mississippi River Inland Waterways System and Gulf Intracoastal Waterway.

APPENDIX K

UNITED STATES DISTRICT COURT

For the District of Columbia

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, ET AL.,

Plaintiffs

v.

Civil Action No. 1190, 1191-74

HOWARD H. CALLAWAY, ET AL.,

Defendants.

ORDER

Upon consideration of Plaintiffs' Motion for a Preliminary Injunction, the Points and Authorities in Support thereof as well as well [sic] as those in opposition thereto, and the voluminous record herein, and for the reasons set forth in the Courts Memorandum Opinion dated September 6, 1974, it is, by the Court, this 5th day of September, 1974.

ORDERED, That Plaintiffs' Motion for a Preliminary Injunction be and the same is hereby granted.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

September 5, 1974
at 4:15 p.m.

APPENDIX L

UNITED STATES DISTRICT COURT

For the District of Columbia

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.,

v.

HOWARD H. CALLAWAY, ET AL.

IZAAK WALTON LEAGUE OF AMERICA, SIERRA CLUB, ET AL.,

v.

HOWARD H. CALLAWAY, ET AL.

ORDER

This matter having come on for hearing on plaintiffs' Motion Temporary Restraining Order and/or Preliminary Injunction this 6th day of August, 1974, and upon consideration of plaintiffs' motion, memorandum in support thereof, affidavits and appendices in support thereof, and the oral argument of counsel; and upon a finding by this Court that the plaintiffs are threatened with immediate and irreparable injury if the defendants proceed with the opening of bids, letting of contracts and commencement of construction on the project known as "Locks and Dam 26—Upper Mississippi Waterway;" and upon a finding that the defendants are in probable violation of one or more of the statutes relied upon by the plaintiffs; and upon a finding that the public interest will be served if the relief requested is granted,

It is hereby ORDERED that defendants, their agents, officers, servants and employees are hereby restrained from the opening of bids, letting of contracts, and any and all acts in furtherance of said aforementioned project until such time as plaintiffs' motion for preliminary injunction shall come on for hearing;

And it is further ORDERED that said motion shall come on for hearing on the 15th day of August, 1974. 10:00 a.m. Bond $500.00

United States District Judge

Dated: August 6, 1974.
3:05 p.m.

APPENDIX M

ADMINISTRATIVE PROCEDURE ACT
5 U.S.C. §§ 500-576

* * *

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

* * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

* * *

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub.L. 94-409, § 4(b), Sept. 13, 1976, 90 Stat. 1247.

* * *

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.
Pub.L. 89-554, Sept. 6, 1966. 80 Stat. 384.

* * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency

may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386; Pub.L. 90-904, § 4(c), Sept. 13, 1976, 90 Stat. 1247.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section

556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show

cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 387; Pub. L. 94-409, § 4(a), Sept. 13, 1976, 90 Stat. 1246.

* * *

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

* * *

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

WATER RESOURCES PLANNING ACT OF 1965
42 U.S.C. § 1962 *et seq.*; P.L. 89-80;
79 Stat. 244.

§ 1962.[Sec. 2] Statement of policy.

In order to meet the rapidly expanding demands for water throughout the Nation, it is hereby declared to be the policy of the Congress to encourage the conservation, development, and utilization of water and related land resources of the United States on a comprehensive and coordinated basis by the Federal Government, States, localities, and private enterprise with the cooperation of all affected Federal agencies, States, local governments, individuals, corporations, business enterprises, and others concerned.

§ 1962-1.[Sec. 3] Effect on existing laws.

Nothing in this Act shall be construed—

(a) to expand or diminish either Federal or State jurisdiction, responsibility, or rights in the field of water resources planning, development, or control; nor to displace, supersede, limit or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more States, or of two or more States and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;

(b) to change or otherwise affect the authority or responsibility of any Federal official in the discharge of the duties of his office except as required to carry out the provisions of this Act with respect to the preparation and review of comprehensive regional or river basin plans and the formulation and evaluation of Federal water and related land resources projects;

(c) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water and related land resources or to exercise licensing or regulatory

functions in relation thereto, except as required to carry out the provisions of this Act; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board and the United States Operating Entity or Entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961 or the International Boundary and Water Commission, United States and Mexico;

(d) as authorizing any entity established or acting under the provisions hereof to study, plan, or recommend the transfer of waters between areas under the jurisdiction of more than one river basin commission or entity performing the function of a river basin commission.

§ 1962a. [Sec. 101] Establishment.

There is hereby established a Water Resources Council (hereinafter referred to as the "Council") which shall be composed of the Secretary of the Interior, the Secretary of Agriculture, Secretary of the Army, the Secretary of Commerce, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Administrator of the Environmental Protection Agency, and the Chairman of the Federal Power Commission. The Chairman of the Council shall request the heads of other Federal agencies to participate with the Council when matters affecting their responsibilities are considered by the Council. The Chairman of the Council shall be designated by the President.

§ 1962a-1. [Sec. 102] Duties.

The Council shall—

(a) maintain a continuing study and prepare an assessment biennially, or at such less frequent intervals as the Council may determine, of the adequacy of supplies of water necessary to meet the water requirements in each water resource region in the United States and the national interest therein; and

(b) maintain a continuing study of the relation of regional or river basin plans and programs to the requirements of larger regions of the Nation and of the adequacy of administrative and statutory means for the coordination of the water and related land resources policies and programs of the several Federal agencies; it shall appraise the adequacy of existing and proposed policies and programs to meet such requirements; and it shall make recommendations to the President with respect to Federal policies and programs.

§ 1962a-2. [Sec. 103] Federal projects procedures.

The Council shall establish, after such consultation with other interested entities, both Federal and non-Federal, as the Council may find appropriate, and with the approval of the President, principles, standards, and procedures for Federal projects intended to be proposed in any plan or revision thereof being prepared by a river basin planning commission.

§ 1962a-3. [Sec. 104] Review of plans.

Upon receipt of a plan or revision thereof from any river basin commission under the provisions of sections 204(3) of this Act [42 USC § 1962b-3(3)], the Council shall review the plan or revision with special regard to—

(1) the efficacy of such plan or revision in achieving optimum use of the water and related land resources in the area involved;

(2) the effect of the plan on the achievement of other programs for the development of agricultural, urban, energy, industrial, recreational, fish and wildlife, and other resources of the entire Nation; and

(3) the contributions which such plan or revision will make in obtaining the Nation's economic and social goals.

Based on such review the Council shall—

(a) formulate such recommendations as it deems desirable in the national interest; and

(b) transmit its recommendations, together with the plan or revision of the river basin commission and the views, comments and recommendations with respect to such plan or revision submitted by any Federal agency, Governor, interstate commission, or United States section of an international commission, to the President for his review and transmittal to the Congress with his recommendations in regard to authorization of Federal projects.

§ 1962a-4. [Sec. 105] Administrative provisions.

(a) *Powers.* For the purpose of carrying out the provisions of this Act, the Council may: (1) hold such hearings, sit and act at such times and places, take such testimony, receive such evidence, and print or otherwise reproduce and distribute so much of its proceedings and reports thereon as it may deem advisable; (2) acquire, furnish, and equip such office space as is necessary; (3) use the United States mails in the same manner and upon the same conditions as other departments and agencies of the United States; (4) employ and fix the compensation of such personnel as it deems advisable, in accordance with the civil service laws and Classification Act of 1949, as amended; (5) procure services as authorized by section 15 of the Act of August 2, 1946 (5 U.S.C. 55a), at rates not in excess of the daily equivalent of the rate prescribed for grade GS-18 under section 5332 of title 5 of the United States Code [5 USC § 5532] in the case of individual experts or consultants; (6) purchase, hire, operate, and maintain passenger motor vehicles; and (7) incur such necessary expenses and exercise such other powers as are consistent with and reasonably required to perform its functions under this Act.

(b) *Oaths.* Any member of the Council is authorized to administer oaths when it is determined by a majority of the Council that testimony shall be taken or evidence received under oath.

(c) *Public inspection of records.* To the extent permitted by law, all appropriate records and papers of the Council may

be made available for public inspection during ordinary office hours.

(d) *Information and personnel from other Federal agencies.* Upon request of the Council, the head of any Federal department or agency is authorized (1) to furnish to the Council such information as may be necessary for carrying out its functions and as may be available to or procurable by such department or agency, and (2) to detail to temporary duty with such Council on a reimbursable basis such personnel within his administrative jurisdiction as it may need or believe to be useful for carrying out its functions, each such detail to be without loss of seniority, pay, or other employee status.

(e) *Responsibility for personnel and funds.* The Council shall be responsible for (1) the appointment and supervision of personnel, (2) the assignment of duties and responsibilities among such personnel, and (3) the use and expenditures of funds.

• • •

DEPARTMENT OF TRANSPORTATION ACT
Section 7, 49 U.S.C. § 1656;
P.L. 89-670; 80 Stat. 941.

* * *

§ 1656. [Sec. 7] Transportation investment standards.

(a) The Secretary, subject to the provisions of section 4 of this Act, shall develop and from time to time in light of experience revise standards and criteria consistent with national transportation policies, for the formulation and economic evaluation of all proposals for the investment of Federal funds in transportation facilities or equipment, except such proposals as are concerned with (1) the acquisition of transportation facilities or equipment by Federal agencies in providing transportation services for their own use; (2) an interoceanic canal located outside the contiguous United States; (3) defense features included at the direction of the Department of Defense in the design and construction of civil air, sea, and land transportation; (4) programs of foreign assistance; (5) water resource projects; or (6) grant-in-aid programs authorized by law. The standards and criteria developed or revised pursuant to this subsection shall be promulgated by the Secretary upon their approval by the Congress.

The standards and criteria for economic evaluation of water resource projects shall be developed by the Water Resources Council established by Public Law 89-80. For the purpose of such standards and criteria, the primary direct navigation benefits of a water resource project are defined as the product of the savings to shippers using the waterway and the estimated traffic that would use the waterway; where the savings to shippers shall be construed to mean the difference between (a) the freight rates or charges prevailing at the time of the study for the movement by the alternative means and (b) those which would be charged on the proposed waterway; and where the estimate of traffic that would use the waterway

will be based on such freight rates, taking into account projections of the economic growth of the area.

The Water Resources Council established under section 101 of Public Law 89-80 is hereby expanded to include the Secretary of Transportation on matters pertaining to navigation features of water resources projects.

(b) Every survey, plan, or report formulated by a Federal agency which includes a proposal as to which the Secretary has promulgated standards and criteria pursuant to subsection (a) shall be (1) prepared in accord with such standards and criteria and upon the basis of information furnished by the Secretary with respect to projected growth of transportation needs and traffic in the affected area, the relative efficiency of various modes of transport, the available transportation services in the area, and the general effect of the proposed investment on existing modes and on the regional and national economy; (2) coordinated by the proposing agency with the Secretary and, as appropriate, with other Federal agencies, States, and local units of government for inclusion of his and their views and comments; and (3) transmitted thereafter by the proposing agency to the President for disposition in accord with law and procedures established by him.

* * *

NATIONAL ENVIRONMENTAL POLICY ACT

42 U.S.C. §§ 4321*et seq.*;
P.L. 91-190; 83 Stat. 852.

§ 4321. [Sec. 2] Congressional declaration of purpose.

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

§ 4331. [Sec. 101] Congressional declaration of national environmental policy.

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations to use all practicable means and measures, including financial and technical assistance in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act [42 USC §§ 4321 *et seq.*], it is the continuing responsibility of the Federal Government to use all practicable means, consistent

with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. [Sec. 102] Cooperation of agencies-reports-availability of information-recommendations-international and national coordination of efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USC

§§ 4321 *et seq.*], and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established in Title II of this Act [42 USC § 4341 *et seq.*], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments

of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and view of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other

responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

§ 4333. [Sec. 103] Conformity of administrative procedures to national environmental policy.

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring

their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

§ 4334.[Sec. 104] Other statutory obligations of agencies.

Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

RIVERS AND HARBORS AND FLOOD CONTROL ACT OF 1970

P.L. 91-611; 84 Stat. 1818.

* * *

Sec. 122. Not later than July 1, 1972, the Secretary of the Army, acting through the Chief of Engineers, after consultation with appropriate Federal and State officials, shall submit to Congress, and not later than ninety days after submission, promulgate guidelines designed to assure that possible adverse economic, social and environmental effects relating to any proposed project have been fully considered in developing such project, and that the final decisions on the project are made in the best over all public interest, taking into consideration the need for flood control, navigation and associated purposes, and the cost of eliminating or minimizing such adverse effects and the following:

(1) Air, noise and water pollution;

(2) destruction or disruption of man-made and natural resources, esthetic values, community cohesion and the availability of public facilities and services;

(3) adverse employment effects and tax and property value losses;

(4) injurious displacement of people, businesses, and farms; and

(5) disruption of desirable community and regional growth.

Such guidelines shall apply to all projects authorized in this Act and proposed projects after the issuance of such guidelines.

PUBLIC LAW 95-502

92 Stat 1963

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—REPLACEMENT OF LOCKS AND DAM 26; UPPER MISSISSIPPI RIVER SYSTEM COMPREHENSIVE MASTER MANAGEMENT PLAN

SEC. 101. (a) The Upper Mississippi River Basin Commission (referred to in this section as the "Commission") shall prepare a comprehensive master plan for the management of the Upper Mississippi River System in cooperation with the appropriate Federal, State, and local officials. The Commission shall publish a preliminary plan not later than January 1, 1981. The Commission shall hold public hearings on the preliminary plan in each State which would be affected by the plan, shall review all comments presented at such hearings or submitted in writing to the Commission, and, after making any revisions in the plan it decides are necessary, submit to Congress a final master plan not later than January 1, 1982. All decisions of the Commission related to the master plan shall be made by a two-thirds majority vote of the Commission.

(b) The Commission shall provide for public participation in the development, revision, and implementation of said plan and shall encourage and assist such participation. The Commission shall, within 150 days after the date of enactment of this Act, publish guidelines in the Federal Register for public participation in the development, revision, and implementation of the plan. The final master plan shall not be implemented without the express approval of the plan by an Act of Congress enacted after the date of enactment of this Act. After such approval, no change may be made in the master plan except as may be provided by an Act of Congress enacted after the date of enactment of the Act approving the master plan. No person shall engage in any activity which violates any provision of the

plan or which is inconsistent (as determined under regulations promulgated by the Commission) with the plan.

(c) The Commission, in developing the plan, shall identify the various economic, recreational, and environmental objectives of the Upper Mississippi River System, recommend guidelines to achieve such objectives, and propose methods to assure compliance with such guidelines and coordination of future management decisions affecting the Upper Mississippi River System, and include with the proposed master plan any legislative proposals which may be necessary to carry out such recommendations and achieve such objectives.

(d) For the purposes of developing the plan, the Commission shall conduct such studies as it deems necessary to carry out its responsibilities under this section, utilizing, to the fullest extent possible, the resources and results of the Upper Mississippi River resources management (GREAT) study conducted pursuant to section 117 of the Water Resources Development Act of 1976 (Public Law 94-587) and of other ongoing or past studies. The Commission may request appropriate Federal, State, or local agencies to prepare such studies. Any Federal agency to which such a request is submitted may conduct any such study for the purpose of this section.

(e) Studies conducted pursuant to this section shall include, but not be limited to, the following:

(1) The Secretary of the Interior and the Secretary of the Army, working through the Commission, shall undertake a study to determine the carrying capacity of the Upper Mississippi River System, and the long- and short-term systematic ecological impacts of (A) present and any projected expansion of navigation capacity on the fish and wildlife, water quality, wilderness, and public recreational opportunities of said rivers, (B) present operation and maintenance programs, (C) the means and measures that should be adopted to prevent or minimize loss of or damage to fish and wildlife, and (D) a specific analysis of

the immediate and systematic environmental effects of any second lock at Alton, Illinois, and provide for the mitigation of any adverse impact on, and the enhancement of, such resources.

(2) The Commission shall undertake studies to determine—

(A) the relationship of any expansion of navigational capacity on the Upper Mississippi River System to national transportation policy,

(B) the direct and indirect effects of any expansion of navigational capacity on the Nation's railroads and on shippers dependent upon rail service, and

(C) transportation costs and benefits to the Nation to be derived from any expansion of navigational capacity on said River System.

The Commission is directed to immediately initiate a specific evaluation of the economic need for a second lock at Alton, Illinois, and the direct and indirect systematic effects and needs for such a second lock at Alton, Illinois.

(3) The Commission shall undertake a program of studies, including a demonstration program to evaluate the benefits and costs of disposing of dredge spoil material in contained areas located out of the floodplain. The program shall include, but shall not be limited to, the evaluation of possible uses in the marketplace for the dredge spoil studies and demonstration programs to minimize the environmental effects of channel operation and maintenance activities.

(4) The development by the Commission of a computerized analytical inventory and system analysis for the Upper Mississippi River System to facilitate evaluation of the comparative environmental effects of alternative management proposals.

(f) Any Secretary responsible for conducting a study under subsection (e) of this section, and other studies conducted under this section, shall produce one or more draft reports containing study conclusions and appropriate appendix materials and shall present the reports to the Commission for approval and inclusion in the master plan process.

(g) To carry out the provisions of this section, there are authorized to be appropriated to the Commission, through the United States Water Resources Council, $12,000,000. The Commission is authorized to transfer funds to such Federal, State, or local government agencies as it deems necessary to carry out the studies and analysis authorized by this section.

(h) For purposes of this section, the Upper Mississippi River System consists of those river reaches containing commercial navigation channels on the Mississippi River main stem north of Cairo, Illinois, the Minnesota River, Minnesota; Black River, Wisconsin; Saint Croix River, Minnesota and Wisconsin; Illinois River and Waterway, Illinois; and Kaskaskia River, Illinois.

(i) No replacement, construction, or rehabilitation that expands the navigation capacity of locks, dams, and channels shall be undertaken by the Secretary of the Army to increase the navigation capacity of the Upper Mississippi River System, until the master plan prepared pursuant to this section has been approved by the Congress except as provided in section 102 and except for necessary operating and maintenance activities.

(j) The lock and dam authorized pursuant to section 102 shall be designed and constructed to provide for possible future expansion. All other construction activities initiated by the Secretary of the Army on the Upper Mississippi River north of Cairo, Illinois, and on the Illinois River north of Grafton, Illinois, shall be initiated only in accordance with the guidelines set forth in the master plan.

SEC. 102. (a) The Secretary of the Army, acting through the Chief of Engineers, is authorized to replace locks and dam 26, Mississippi River, Alton, Illinois, and Missouri, by constructing a new dam and a single, one-hundred-and-ten-foot by one-thousand-two-hundred-foot lock at a location approximately two miles downstream from the existing dam, substantially in accordance with the recommendations of the Chief of Engineers in his report on such project dated July 31, 1976, at an estimated cost of $421,000,000.

(b) The Secretary of the Army, acting through the Chief of Engineers, is authorized to replace, at Federal expense as a part of project costs authorized in subsection (a) terrestrial wildlife habitat inundated as a result of the construction of the project on an acre-for-acre basis in the respective States of Missouri and Illinois and to manage such lands as are thus acquired by the Secretary for wildlife protection purposes. The Secretary is further authorized to provide project-related recreation development on or in the vicinity of Ellis Island, Missouri, that requires no separable project lands and includes facilities such as roads, parking lots, walks, picnic areas, a boat launching ramp, and a beach, at an estimated cost of $4,000,000 to be cost shared with the State of Missouri and administered in accordance with the provisions of the Federal Water Project Recreation Act and undertaken independently of the navigation feature of the project.

(c) The project depth of the channel above Cairo, Illinois, on the Mississippi River shall not exceed 9 feet, and neither the Secretary of the Army nor any other Federal official shall study the feasibility of deepening the navigation channels in the Minnesota River, Minnesota; Black River, Wisconsin; Saint Croix River, Minnesota and Wisconsin; the Mississippi River north of Cairo, Illinois; the Kaskaskia River, Illinois; and the Illinois River and Waterway, Illinois, unless specifically authorized by an Act of Congress enacted after the date of enactment of this Act.

TITLE II—INLAND WATERWAYS REVENUE ACT OF 1978

Sec. 201. Short title.
Sec. 202. Imposition of tax.
Sec. 203. Establishment of Inland Waterways Trust Fund.
Sec. 204. Trust Fund available for expenditures for navigation construction and rehabilitation projects on inland waterways.
Sec. 205. Study with respect to inland waterway user taxes and charges.
Sec. 206. Inland and intracoastal waterways of the United States.

SEC. 201. SHORT TITLE.

This title may be cited as the "Inland Waterways Revenue Act of 1978".

SEC. 202. IMPOSITION OF TAX.

(a) IN GENERAL—Chapter 31 of the Internal Revenue Code of 1954 (relating to special fuels) is amended by adding at the end thereof the following new section:

"SEC. 4042. TAX ON FUEL USED IN COMMERCIAL TRANSPORTATION ON INLAND WATERWAYS.

"(a) IN GENERAL.—There is hereby imposed a tax on any liquid used during any calendar quarter by any person as a fuel in a vessel in commercial waterway transportation.

"(b) AMOUNT OF TAX.—The tax imposed by subsection (a) shall be determined from the following table:

"If the use occurs—	The tax is—
"After September 30, 1980 and before October 1, 1981	4 cents a gallon
"After September 30, 1981 and before October 1, 1983	6 cents a gallon
"After September 30, 1983 and before October 1, 1985	8 cents a gallon
"After September 30, 1985	10 cents a gallon

* * * *

Appendix

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Office-Supreme Court, U.S.
FILED
SEP 8 1981
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CLERK

No. 81-360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Petitioners,

v.

JOHN O. MARSH, JR., Secretary, Department of the Army, *et al.*,

Respondents.

THE IZAAK WALTON LEAGUE OF AMERICA, *et al.*,

Petitioners,

v.

JOHN O. MARSH, JR., Secretary, Department of the Army, *et al.*,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

For The Izaak Walton League of America, et al.

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

For The Atchison, Topeka and Santa Fe Railway Company, et al.

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

JOSEPH D. FEENEY
Western Railroad Association
222 South Riverside Plaza
Chicago, Illinois 60606
(312) 648-7812

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pursuant to Rule 28.1 of the United States Supreme Court Rules, a listing of all parent companies, subsidiaries and affiliates of all corporate petitioners is set forth below.

PETITIONER	PARENT, SUBSIDIARIES, OR AFFILIATES
The Atchison, Topeka and Santa Fe Railway Company	Santa Fe Industries, Inc. Alameda Belt Line The Belt Railway Company of Chicago Central California Traction Company Chicago Produce Terminal Company The Denver Union Terminal Railway Company Houston Belt & Terminal Railway Company Joliet Union Depot Company Kansas City Terminal Railway Company The Oakland Terminal Railway Oklahoma City Junction Railway The Pueblo Union Depot and Railroad Company The Pullman Company St. Joseph Terminal Railroad Company Sunset Railway Company Texas City Terminal Railway Company Trailer Train Company The Wichita Union Terminal Railway Company

PETITIONER	PARENT, SUBSIDIARIES, OR AFFILIATES
Burlington Northern Inc.	The Belt Railway Company of Chicago
	Butte Pipe Line Company
	Camas Prairie Railroad Company
	Chicago Union Station
	The Colorado and Southern Railway Company
	Davenport, Rock Island and North Western Railway Company
	Denver Union Terminal Railway Company
	Illinois Terminal Railroad Company
	Iowa Transfer Railway Company
	Kansas City Terminal Railway Company
	Keokuk Union Depot Company
	The Lake Superior Terminal and Transfer Railway Company
	Longview Switching Company
	Minnesota Transfer Railway Company
	New Mexico and Arizona Land Company
	Northern Resources, Inc.
	Paducah & Illinois Railroad Company
	Portal Pipe Line Company
	Portland Terminal Railroad Company
	Quanah, Acme & Pacific Railway Company
	The Saint Paul Union Depot Company
	Terminal Railroad Association of St. Louis
	Trailer Train Company

PETITIONER	PARENT, SUBSIDIARIES, OR AFFILIATES
	Western Fruit Express Company
	Wichita Union Terminal Railway Company
	Winona Bridge Railway Company
Chicago and North Western Transportation Company	Des Moines & Central Iowa Railway Company
	Illinois Terminal Railroad Company
	Iowa Transfer Railway Company
	Kansas City Terminal Railway Company
	The Lake Superior Terminal and Transfer Railway Company of the State of Wisconsin
	Minneapolis Eastern Railway Company
	Minnesota Transfer Railway Company
	Peoria and Pekin Union Railway Company
	The Saint Paul Union Depot Company
	Trailer Train Company
Richard B. Ogilvie, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor	Chicago, Milwaukee Corporation
	Chicago, Terre Haute and South Eastern Railroad Company
	Chicago Union Station Company
	Davenport, Rock Island and North Western Railway Company
	Des Moines Union Railway Company
	Indiana Harbor Belt Railroad Company
	Kansas City Terminal Railway Company

PETITIONER	PARENT, SUBSIDIARIES, OR AFFILIATES
	The Minnesota Transfer Railway Company
	Minneapolis Eastern Railway Company
	The Pullman Company
	Trailer Train Company
	Longview Switching Company
	Northern Tier Pipeline Company
Denver and Rio Grande Western Railroad Company	Rio Grande Industries, Inc.
	Trailer Train Company
Illinois Central Gulf Railroad Company	IC Industries, Inc.
	New Orleans Great Northern Railway Company
	Trailer Train Company
The Kansas City Southern Railway Company	Kansas City Southern Industries, Inc.
	Joplin Union Depot Company
Missouri-Kansas-Texas Railroad Company	Katy Industries, Inc.
	Galveston, Houston & Henderson Railroad Company
	Joplin Union Depot Company
	Kansas City Terminal Railway Company
	Pullman Company
	Terminal Railroad Association of St. Louis
	Texas City Terminal Railway Company
	Trailer Train Company
Missouri Pacific Railroad Company	Missouri Pacific Corporation
	Arkansas & Memphis Railway Bridge and Terminal Company

PETITIONER	PARENT, SUBSIDIARIES, OR AFFILIATES
	The Belt Railway Company of Chicago
	Chicago and Western Indiana Railroad Company
	Great Southwest Railroad, Inc.
	Illinois Terminal Railroad Company
	Kansas City Terminal Railway Company
	The Pueblo Union Depot and Railroad Company
	Terminal Industrial Land Company
	Terminal Railroad Association of St. Louis
	Texas City Terminal Railway Company
	Trailer Train Company
Norfolk and Western Railway Company	The Akron, Canton & Youngstown Railroad Company
	The Belt Railway Company of Chicago
	Chesapeake Western Railway
	Chicago and Western Indiana Railroad Company
	The Cincinnati Union Terminal Company
	The Cleveland Union Terminals Company
	Dereco, Inc.
	Des Moines Union Railway Company
	The Detroit and Toledo Shore Line Railroad Company
	Fairport, Painesville and Eastern Railway Company
	Fort Wayne Union Railway Company

PETITIONER	PARENT, SUBSIDIARIES, OR AFFILIATES
	Fruit Growers Express Company
	Green Real Estate Company
	Illinois Terminal Railroad Company
	Kansas City Terminal Railway Company
	Keokuk Union Depot Company
	The Lake Erie and Fort Wayne Railroad Company
	NWS Enterprises, Inc.
	New Jersey, Indiana & Illinois Railroad Company
	The Nickel Plate Improvement Company, Inc.
	Norfolk, Franklin and Danville Railway Company
	Norfolk and Portsmouth Belt Line Railroad Company
	Peoria and Pekin Union Railway Company
	Pittsburgh and Cross Creek Railroad Company
	Pocahontas Land Corporation
	Powhatan Oil and Gas Corporation
	The Pullman Company
	The Scioto Valley and New England Railroad Company
	Shenandoah-Virginia Corporation
	South Buffalo Development Co., Inc.
	Terminal Railroad Association of St. Louis
	The Toledo Belt Railway Company
	The Toledo Terminal Railroad Company
	Trailer Train Company

PETITIONER	PARENT, SUBSIDIARIES, OR AFFILIATES
	Union Belt of Detroit
	Virginia Holding Corporation
	Wabash Railroad Company
	The Wheeling and Lake Erie Railway Company
	Winston-Salem Southbound Railway Company
St. Louis Southwestern Railway Company	Southern Pacific Transportation Company
	The Alton & Southern Railway Company
	Southern Illinois and Missouri Bridge Company
	Arkansas & Memphis Railway Bridge & Terminal Company
	Terminal Railroad Association of St. Louis
	Trailer Train Company
	Kansas City Terminal Railway Company
SOO Line Railroad Company	Minnesota Transfer Railway Company
	The Saint Paul Union Depot Company
	The Belt Railway Company of Chicago
	The Lake Superior Terminal and Transfer Railway Company
	Canadian Pacific Limited
Southern Pacific Transportation Company	Southern Pacific Company
	Central California Traction Company
	The Ogden Union Railway & Depot Company

PETITIONER	PARENT, SUBSIDIARIES, OR AFFILIATES
	Portland Terminal Railroad Company
	Portland Traction Company
	St. Louis Southwestern Railway Company
	Sunset Railway Company
	Trailer Train Company
Toledo, Peoria & Western Railroad Company	Transit Ice Company
	The Atchison, Topeka and Santa Fe Railway Company
	Trailer Train Company
Union Pacific Railroad Company	Union Pacific Corporation
	Camas Prairie Railroad Company
	Denver Union Terminal Railway Company
	Harbor Belt Line Railroad
	Kansas City Terminal Railway Company
	Longview Switching Company
	Mount Hood Railway Company
	The Ogden Union Railway & Depot Company
	Pacific Fruit Express Company
	Portland Terminal Railroad Company
	Portland Traction Company
	St. Joseph Terminal Railroad Company
	Spokane International Railroad Company
	The Pullman Company
	Trailer Train Company
	Yakima Valley Transportation Company

PETITIONER	PARENT, SUBSIDIARIES, OR AFFILIATES
The Izaak Walton League of America	None
The Sierra Club	The Sierra Club Foundation Sierra Club Legal Defense Fund, Inc.
Izaak Walton League of America, Illinois Division	None

Opposition

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No. 81-360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, *Petitioners,*

v.

JOHN O. MARSH, JR., SECRETARY, DEPARTMENT OF THE ARMY, *et al.*, *Respondents.*

THE IZAAK WALTON LEAGUE OF AMERICA, *et al.*, *Petitioners,*

v.

JOHN O. MARSH, JR., SECRETARY, DEPARTMENT OF THE ARMY, *et al.*, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO CERTIORARI OF RESPONDENT THE ASSOCIATION FOR THE IMPROVEMENT OF THE MISSISSIPPI RIVER

GEORGE V. ALLEN, JR.
RAMSAY D. POTTS
WILLIAM P. BARR

SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000

Counsel for Respondent Association for the Improvement of the Mississippi River

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Did the district court properly decline to hold a *de novo* trial in reviewing informal agency action?

2. Was the district court's finding of fact that the complete administrative record had been produced for review clearly erroneous?

RULE 28.1 STATEMENT

The following information is provided pursuant to Rule 28.1 of the United States Supreme Court Rules:

Respondent Association for the Improvement of the Mississippi River is a non-profit corporation. It has no parent, no subsidiaries, and no affiliate.

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Respondents.

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Petitioners,

v.

JOHN O. MARSH, JR., SECRETARY, DEPARTMENT OF THE ARMY, *et al.*,

Respondents.

Brief In Opposition To Certiorari Of Respondent The Association For The Improvement Of The Mississippi River

STATEMENT OF THE CASE

In 1974 the petitioners, eighteen railroads and two environmental groups, brought these actions to enjoin the Corps of Engineers from building a replacement facility for Locks and Dam 26 — a critically important but deteriorating navigation facility at the juncture of the Mississippi and Illinois rivers. As originally proposed, the new double-lock facility had two purposes: (1) to replace the unsafe existing structure and (2) to increase its traffic carrying capacity by 130 percent — from 73 million tons

annually to 170 million annually. The additional capacity was needed to eliminate a severe existing bottleneck and to meet projected traffic increases through the year 2030.

On 6 September 1974 the district court enjoined the project, agreeing with petitioners' contentions that it had not been authorized by Congress and that the EIS was inadequate.

In response to the injunction, the Corps spent two years reassessing its original proposal. It revised the project's EIS and prepared a comprehensive economic cost-benefit analysis which Congress requires as the first step in authorization of a new waterway project. As a result of these studies, the Corps decided to seek congressional authorization for a scaled-down, single-lock facility with an estimated annual capacity of 86 million tons, an increase of only 18 percent over the capacity of the existing facility. The EIS was again revised, and the Corps presented to Congress further economic analysis indicating that the one-lock project's economic benefits would exceed its economic costs. In August 1976 the Secretary of the Army submitted the single-lock proposal to Congress.

During this reevaluation period, petitioners fully participated in the Corps' planning activities, vigorously opposing even a single-lock proposal. They raised three main objections: (1) they asserted that, from an engineering standpoint, rehabilitation of the existing structure was just as safe and was more economical than building a new one; (2) they argued that even the small barge-traffic increase that would result from the single-lock replacement facility would have a substantial adverse environmental impact; and (3) they claimed that upstream congestion would nullify any economic benefits claimed for the project. Petitioners aired these objections at four

public meetings held by the Corps. They prepared hundreds of pages of engineering, environmental and economic comments in response to the draft EIS. A major portion of the final EIS was devoted to a discussion of petitioners' objections, which were included verbatim. The Corps also circulated its comprehensive economic cost-benefit studies to petitioners for review and comment, even though these studies are prepared for Congress and are normally developed without public participation. Petitioners' separate comments on the economic studies were also included in the EIS and were addressed in, and to a large extent incorporated into, a revised cost-benefit report which the Corps sent to Congress.

Congress gave the Lock and Dam 26 project closer scrutiny than any navigation facility has ever received. It considered the project for two years and held an unprecedented 12 days of hearings on the project. At these hearings, petitioners gave hundreds of pages of testimony in which they reiterated their objections. After extensive floor debate, Congress enacted P.L. 95-502 authorizing construction of the single-lock facility. The bill was signed by the President on 30 October 1978.[1]

Under the Corps' internal regulations, construction of an authorized project is preceded by an updated reevaluation which is intended to identify projects which are no longer justified because of changes in relevant facts after

[1] This statute is not simply an authorization bill. It creates a comprehensive program for the management of the Upper Mississippi River Waterway System. Among other things, the bill imposes a user tax on waterway traffic and establishes a commission to conduct the most comprehensive studies ever undertaken on the environmental and economic effects of waterway transportation. It required the commission to prepare a "master plan" for the system, based on the mandated studies, and it prohibits any further expansion of naviga-

authorization. Pre-authorization studies are not repeated unless significant changes have occurred. If there have been no such changes, the project is "reaffirmed" and engineering design work commences. In this case, the Corps determined on 10 January 1979 that there had been no significant change during the four months since authorization of the Locks and Dam 26 project and "reaffirmed" the economic feasibility of the project. Detailed design work was completed and construction bids were requested.

Petitioners responded to Congress' authorization of the project by filing an Amended Complaint which challenged the lawfulness of the Corps' post-authorization decisionmaking process. The Amended Complaint reiterated the petitioners' contentions concerning the adequacy of both the EIS and the cost-benefit analysis. The petitioners also contended that the post-authorization

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tion facilities until the master plan is approved by Congress. The bill expressly exempts the single-lock replacement facility from these limitations, authorizing its immediate construction.

These provisions are the result of a legislative compromise designed to accommodate the interests of three separate groups. Environmentalists succeeded in imposing the mandatory moratorium on further waterway expansion anywhere in the system until further studies are performed, but to achieve this general halt they accepted a bill which specifically exempted the single-lock replacement facility from the moratorium. As a *quid pro quo* for accepting construction of the single-lock facility, the railroad industry exacted an historic tax on waterway use, designed to eliminate any competitive advantage that replacement of Locks and Dam 26 might have otherwise created. Representatives of the Upper Midwest and supporters of waterway transportation gave their support to a bill with the moratorium and tax features in return for immediate construction of the authorized facility.

process must include formal adjudication of the factual claims which they had unsuccessfully presented to Congress.

The district court held a 5-day bench trial in October 1979. Petitioners' evidentiary case consisted of the same opinions of the same individuals whose views against the project had previously been expressed in the petitioners' comments on the EIS and in their congressional testimony. A private engineer retained by the railroads again stated that he disagreed with the EIS's conclusion that building a new replacement facility would be safer and ultimately more economical than rehabilitation of the existing structure. Two biologists repeated their disagreement with the EIS's conclusion that the 6-tow per day traffic increase resulting from the expanded replacement structure would have no significant environmental impacts. The petitioners' economist disputed the Corps' economic projections and benefit estimates, giving the same reasons which the Corps and Congress had explicitly rejected in the EIS and in the committee reports. The Corps of Engineers responded by putting four of its own engineers, scientists, and economists on the stand to explain the Corps' conclusions.

The district court excluded no evidence but refused to resolve disputed technical issues *de novo*. Applying the "arbitrary and capricious" standard, the court concluded that the Corps' engineering, environmental, and economic judgments were reasonable. The court's final judgment, entered 23 October 1979, denied petitioners injunctive relief, holding: (1) that the Corps had fully complied with NEPA; and (2) that petitioners' economic claims, through cognizable under NEPA, were without merit. The court specifically held, in addition, that the Corps had provided the full administrative record

underlying its economic projections and had not used "secret data," as petitioners' economic witness had contended.

On 24 April 1981 the court of appeals issued an exhaustive opinion, affirming the district court in all material respects.[2]

REASONS FOR DENYING THE WRIT

Petitioners seek *certiorari* on two grounds. They contend: (1) that, in reviewing the Corps' economic conclusions, the district court erred by refusing to hold a *de novo* trial on disputed technical issues (Pet. at 6-12, 15-21); and (2) that the Corps has prevented proper judicial review of its decision by basing its economic forecasts on "secret data" (Pet. at 12-14, 21-24). Neither of these claims warrant review by the Supreme Court.

I. Petitioners' Contention that a Court Reviewing Informal Agency Action Must Hold A *De Novo* Trial Has Already Been Rejected By This Court in the *Overton Park* Case.

Petititioners do not challenge the adequacy of the Corps' presentation of disputed issues in the EIS and in the associated economic studies. Nor do petitioners contest the fact that their views on these issues have been thoroughly aired and considered in the decisionmaking

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[2] The district court found that the Corps deviated from an internal guideline by failing to hold a town-hall type, non-adjudicatory "public meeting" during post-authorization planning. However, the district court concluded that this failure was neither material nor prejudicial, and it refused to order that such a meeting be held. On this single point, the court of appeals reversed, requiring the Corps to hold the public meeting. The Corps held the required public meeting on 9 September 1981. The Petition places no reliance on this earlier dispute concerning the holding of a non-adjudicatory public meeting.

process. In the lower courts, but not in this Court, petitioners' challenge was directed at the merits of the Corps' resolution of these disputed facts. The issue which petitioners ask this Court to review is whether the Administrative Procedure Act required the district court to resolve disputed technical issues by a preponderance of the evidence adduced at trial. Petitioners ask this Court to hold that a district court must conduct a *de novo* trial in reviewing any agency action (including informal rulemaking under § 553 of the APA) if no formal hearing was provided at the agency level. (Pet. at 15-16).

Petitioners' contentions do not merit serious consideration by this Court. Indeed, this Court has already considered these arguments and has emphatically rejected them in two recent cases.

The first of these cases, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), is indistinguishable from the case at bar. In that case, the Secretary of Transportation made a decision to fund a highway project based upon an informal determination, required under the statute, that there was no "feasible" alternative. Citizens' groups challenged the funding decision on a variety of grounds, including the identical claim advanced by petitioners here: that, since there had been no formal adjudicatory hearing at the agency level, the district court was required to resolve disputed factual issues regarding feasibility *de novo*. 401 U.S. at 414. Rejecting this contention, this Court held that judicial review of such informal agency action must be based on the administrative record that was before the decisionmaker at the time the decision was made. *Id.* at 420. The opinion emphasizes that a reviewing court is "not empowered to substitute its judgment for that of the agency" and explains that the court's function in reveiwing informal

agency action is "a narrow one." *Id.* at 416. The reviewing court's role is to ensure that the agency's conclusion was based on relevant factors and was not arbitrary or capricious. *Id.* This is precisely the standard applied by the lower courts in this case.[3]

Two years later, in *Camp* v. *Pitts*, 411 U.S. 138 (1973), this Court reaffirmed the principle that informal agency action should not be reviewed *de novo*. In that case, the Comptroller of the Currency, proceeding under a statute which did not require a formal hearing, refused to issue a certificate authorizing the organization of a new bank. The district court declined to hold a *de novo* trial and sustained the Comptroller's ruling on the administrative record. The court of appeals reversed, holding that the basis of the Comptroller's decision was too obscure to enable adequate review, and ordered "a trial *de novo* before the District Court." 411 U.S. at 139-140. Reversing the court of appeals, this Court held that "the appropriate standard of review was . . . whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'," and "in applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Id. at 142. *Camp* v. *Pitts* has *a fortiori* application here, where the agency's decision is based on

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[3] Petitioners in *Overton Park*, like the petitioners in this case, argued that they were entitled to *de novo* review under § 706(2)(F) of the APA which provides that a court shall hold unlawful agency action "unwarranted by the facts to the extent the facts are subject to trial *de novo* by the reviewing court." The decision in *Overton Park* thus squarely holds that the decision to construct a road is not subject to trial *de novo* under § 706(2)(F). The decision in this case is indistinguishable.

facts which were developed after lengthy and open deliberation and on reasons which have been explained with meticulous care.

The teaching of *Overton Park* and *Camp* v. *Pitts* has been consistently followed in subsequent cases in this court and in lower federal courts. *E.g. FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976); *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975); *Doraiswamy* v. *Secretary of Labor*, 555 F.2d 832 (D.C. Cir. 1976); *see Ethyl Corp.* v. *EPA*, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976). It is thus well established that in reviewing informal agency action a federal court must not engage in a *de novo* trial but must confine itself to the administrative record in determining whether the agency's conclusions were "arbitrary and capricious." This is especially true where the agency's "factual" determinations are primarily of a technical, judgmental or predictive nature. *Cf. FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-14 (1978).

Petitioners advance no sound reasons for overruling established precedent. The rule which petitioners would have this Court establish would inject courts into the routine work of the executive departments of the federal government to a degree which is clearly unwarranted. The petitioners' arguments, if accepted, would impose intolerable costs, would seriously impede the ability of agencies to administer important public programs, and would violate basic principles concerning the separation of judicial and executive power.

II. As Finder of Fact, the District Court Concluded That Petitioners' "Secret Data" Claims Were Baseless. This Finding Was Clearly Correct and Does Not Warrant Reexamination Here.

Petitioners contend that the Corps has prevented proper judicial review of its economic conclusions by with-

holding the "data, computations and methodology" that were used to compute project cost and benefits. This claim was specifically addressed in the trial court and was properly found factually untrue.

The plain fact is that the Corps' methodology and all data used by the Corps in its cost-benefit computations are published and explained in the study documents themselves. Everything necessary for an understanding of the Corps' analysis can be found in these documents, and, at trial, it was clearly established that the Corps' analysis was completely understood by petitioners.[4] Not only was the methodology and all data used by the Corps published, but in addition, the Corps made available to petitioners *all* back-up data and material in its possession which was even remotely connected to its economic analysis. The Corps has filed affidavits that "every shred" of material has been produced, and petitioners have admitted receiving "millions" of documents from the Corps. It is difficult to imagine a case in which an agency has been more accommodating. Petitioners were permitted to plumb the bowels of an agency for every piece of paper

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[4] The evidence, briefly summarized below, clearly established that the Corps' methodology, data and calculations were completely disclosed and fully understood by petitioners.

Disclosure of methodology: The methodology used in the FER study is explained in Chapter 7 of the FER (DX 43). (FER at pp. 7-1 to 7-12.) The Corps used the same methodology in the SED study, as is explained in Chapter 7 of the SED (DX 59). (SED at pp. 7-1 to 7-20.) The Corps' methodology is also reviewed and explained in GDM Supp. No. 2 (DX 61 at pp. 20-1 to 20-20) and in the report of the Board of Engineers for Rivers and Harbors (DX 58). (BERH at pp. 34-57.) Petitioners clearly understood the methodology. Petitioners' counsel himself gave a very clear and detailed, step-by-step description of the Corps' methodology during cross-examination of a Corps witness. (Daniel Test. at J.A. 1810-14.) The railroads'

generated at the working level which was even remotely associated with an issue which they sought to dispute.

At trial, petitioners were closely interrogated on precisely what data was allegedly being kept secret. In response, they identified the *names* of certain barge carriers who gave rate information to a private consultant who

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economist, Dr. Haveman, testified that he had duplicated the Corps' computer model and run it successfully with the Corps' data and methodology. (Haveman Test. at J.A. 1018-29, 1034, 1096-1100.)

Disclosure of "raw data": There were *three* — and only *three* — elements of raw data used by the Corps: (1) base year tonnages; (2) commodity projections; and (3) estimated rate differentials. *All* of the data that was used is published in the study documents. The base year tonnages are set forth in RDSEIS (DX 47) as Response No. 57 to the Western Railroad Association. The commodity projections are published in Chapter 3 of the FER and in Chapter 3 of the SED. The rate differentials are set forth in appendices I and J of the FER and Attachment 1 to Appendix I of the SED. All of this information is duplicated in Chapter 8 of the SED in precisely the form in which it was fed into the Corps' computer model.

Disclosure of "calculations" and "computations": The Corps' methodology requires a simple series of arithmetic procedures — addition, subtraction, multiplication, and division. Because these operations must be performed in proper sequence on millions of items of data, the Corps used a computer program to accomplish this task. The program is described in Chapter 7 of the FER and chapter 7 of the SED. While the nature and sequence of the operations (i.e. the methodology) is fully described in the study documents, the actual computations from raw data to final figures are not included since they were performed by the computer. Corps economists and programmers from the St. Louis District assisted petitioners in their efforts to modify or adopt the computer program so that the computations could be performed by the railroads on their own computer. At trial, the railroad economist testified that petitioners had succeeded in duplicating the Corps' program and had run several sensitivity studies on it. (Haveman Test. at J.A. 1018-1029, 1034, 1096-1100.)

had performed a rate differential study for the Corps. Haveman Testimony at J.A. 1084-92; *see* Chimento Deposition at J.A. 2943-48. These names were withheld by the consultant, who had obtained them under a promise of confidentiality. They were therefore not part of the administrative record.

The district judge, who had supervised the litigation for six years, correctly found, as a fact, that the Corps had produced a complete administrative record and that petitioners had access to all information except for the names of the barge carriers contacted confidentially by the rate study consultant. (Appendix E at pp. E-25 to E-26, E-39.) The district court also found, as a fact, that the names of the carriers were not needed by petitioners or by other interested persons to understand the Corps' analysis. After a careful review of the record, the court of appeals affirmed these findings, characterizing petitioners' "secret data" claim as "disingenuous." (Appendix C at pp. C-45 to C-50.) These findings are not only reasonable but are the only possible conclusions that can be reached from the evidence. This fact issue does not warrant further examination by this Court.

CONCLUSION

The Lock and Dam 26 project has been given more careful consideration and closer scrutiny in all three branches of government than any other waterway project in history. At every stage of the process — in the executive agencies, in Congress, and in the courts — petitioners have had a full opportunity to present their views, and their views have been given fair consideration. It would be difficult to find a better example of "reasoned decisionmaking."

The fact that petitioners disagree with the ultimate conclusions reached by the Corps (and by Congress) does not provide a legal basis for challenging this project. Petitioners arguments for *certiorari* are based, on the one hand, on a profound misunderstanding of the proper function of the courts in the administrative process and, on the other hand, on an unsupported factual allegation that has rightly been dismissed as "disingenuous" by both courts that have reviewed it. There is clearly no grounds for the Supreme Court to consider this case. The petition for writ of *certiorari* should be denied.

Respectfully submitted,

GEORGE V. ALLEN, JR.
RAMSAY D. POTTS
WILLIAM P. BARR

SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000

Attorneys for Respondent
Association for the Improvement
of the Mississippi River

Opposition

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In the Supreme Court of the United States

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

THE IZAAK WALTON LEAGUE OF AMERICA, ET AL., PETITIONERS

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
DIRK D. SNEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether railroads and environmental groups, opposed to construction of Lock and Dam 26, authorized by Congress in 1978 to replace a deteriorating facility aiding commercial barge navigation on the Mississippi River, are, under the Administrative Procedure Act, entitled to have their continuing objections to the economic feasibility and desirability of the authorized project "adjudicated" by a federal district court in trial *de novo*.

2. Whether the district court's finding of fact that the complete administrative record had been produced for review was clearly erroneous.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-360

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

THE IZAAK WALTON LEAGUE OF AMERICA, ET AL., PETITIONERS

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C69) is reported at 655 F.2d at 346. The final opinion of the district court (Pet. App. E1-E43) is reported at 480 F. Supp. 980. Prior opinions of the

district court (Pet. Apps. G1-G9, H1-H11, I1-I16, J1-J23) are reported, respectively, at 480 F. Supp. 976-979; 459 F. Supp. 188; 431 F. Supp. 722; and 382 F. Supp. 610. An additional district court opinion of March 16, 1979, which was not appended to the petition, is reported at 480 F. Supp. 972.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1981.[1] A petition for rehearing and rehearing en banc was denied on May 27, 1981 (Pet. Apps. A1, B1). The petition for a writ of certiorari was filed on August 25, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 102(a) of Title I of the Act of Oct. 21, 1978, Pub. L. No. 95-502, 92 Stat. 1695, states:

> The Secretary of the Army, acting through the Chief of Engineers, is authorized to replace locks and dam 26, Mississippi River, Alton, Illinois, and Missouri, by constructing a new dam and a single, one-hundred-and-ten-foot by one-thousand-two-hundred-foot lock at a location approximately two miles downstream from the existing dam, substantially in accordance with the recommendations of the Chief of Engineers in his report [H.R. Doc. No. 94-584, 94th Cong., 2d Sess. (1976)] on such project dated July 31, 1976, at an estimated cost of $421,000,000.

The remainder of Title I is appended to the petition (Pet. App. M27-M31).

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[1] The judgment of the court of appeals is not appended to the petition. See Rule 21.1(k)(iii) of this Court.

STATEMENT

1. Commercial barge navigation on the Upper Mississippi River is aided by 27 locks and dams constructed, maintained, and operated by the U.S. Army Corps of Engineers. Since late 1979, Lock and Dam 26 has been under construction near Alton, Illinois. Such construction was authorized by Congress in 1978 to replace an existing facility, built two miles upstream in 1938. The existing facility "has a history of structural problems, including settlement, underseepage, and loss of foundation material" leading to "increased maintenance and operation costs" (Pet. App. C7). In addition, the location of the existing double locks and dam near the tributary Missouri and Illinois Rivers impedes most commercial barge traffic destined for any location along the Mississippi system; barges awaiting lockage are delayed as much as 10 hours (Pet. App. C3, C6-C7). The congressionally authorized replacement will consist of a 1,200-foot single lock with an estimated increased capacity to pass 13 million more tons of cargo per year than was possible with the existing double locks.

In 1968, Corps officials recommended construction of a replacement with two (rather than one) 1,200-foot locks. The Secretary of the Army, believing that Congress had authorized him to replace such navigation works, directed that the recommended replacement be built,[2] and Congress appropriated construction funds in 1974 (Pet. App. C7-C8).

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[2] The Secretary's position was that in 33 U.S.C. 5 Congress had granted permanent authorization to replace navigation works such as the existing one without the need to secure authorization for replacements on a case by case basis. The district court in this case disagreed and ruled that new con-

In August 1976, the Secretary withdrew his authorization of a *double*-lock replacement and proposed to Congress that it pass legislation authorizing a *single*-lock replacement. Documents accompanying the Secretary's 1976 proposal to Congress included a two-volume Final Environmental Impact Statement (FEIS) which incorporated by reference as appendices two earlier multivolume environmental impact statements plus the Corps' three-volume Design Memorandum No. 11, entitled "Formulation Evaluation Report" (FER) (June 1975), containing economic and engineering data. The FER was supplemented in January 1977 by a two-part document entitled "Supplemental Economic Data" (SED), compiled by the Corps in response to comments by petitioners [3] and the public [4] to the FER; it was sent to Congress (Pet. Apps. C11, E11).

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gressional authorization was required pursuant to 33 U.S.C. 401 (Pet. App. J7-J10, J14-J16). The Federal respondents did not appeal this ruling and the requisite authorization was subsequently obtained.

[3] Petitioners are 15 midwestern railroads and three environmental groups (Pet. Supp. App. 1-9) which opposed the replacement before congressional committees as well as in this protracted litigation, which commenced in 1974. The railroads claimed that incremental barge traffic, expected to pass through the replacement lock, will compete with their freight business. The environmental groups contended that increased traffic throughout the Upper Mississippi River would result in environmental harm.

[4] Four public meetings, attended by petitioners' representatives, were held by the Corps in connection with the proposed double-lock replacement (Pet. App. C12). At two public meetings in July and September 1975, comments on the FER and an earlier draft of the environmental impact statement

Extensive hearings on the proposed replacement were held before House and Senate committees both in 1976 and 1977 followed by lengthy floor debate in October 1978 (Pet. App. C12-C14). Petitioners participated in these committee hearings; included in their many objections was their claim that the Corps had "not properly computed the project's economic cost-benefit ratio" (*id.* at C14). That ratio was closely scrutinized by both congressional committees. S. Rep. No. 95-215, 95th Cong., 1st Sess. 7-8 (1977); H.R. Rep. No. 95-545, 95th Cong., 1st Sess. 17-18 (1977); Pet. App. C23 n.28.

The authorizing legislation was passed on October 21, 1978. Pub. L. No. 95-502, 92 Stat. 1693. Title I of the Act (92 Stat. 1693-1695) authorized the single-lock replacement proposed by the Corps (Section 102(a), 92 Stat. 1695), with certain limitations (Pet. App. C15). Expanding the capacity of channels and other navigation works on the Upper Mississippi System was forbidden until Congress approved a comprehensive master plan to be prepared for that System (Section 101(a), (i)-(j), 92 Stat. 1693, 1695) and until Congress authorized such expansion in future legislation (Sections 101(i), 102(c), 92 Stat. 1695). Congress was mindful of the concerns of competing rail transportation—normally burdened with the need to meet its own right-of-way costs from private financing—and reached a legislative

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were received (Pet. App. E11). The FER contained an alternative economic evaluation of the single 1,200-foot lock, as was eventually proposed to, and authorized by, Congress. These public meetings were nonadjudicatory and informally conducted to exchange information and comments (Pet. App. C12 n.18, C34).

balancing of competing interests. Thus, in Title II of the Act (92 Stat. 1696-1702), Congress levied, for the first time in history, a waterway user charge in the form of a tax on all fuel used in commercial inland waterway transportation.[5]

2. Less than three months after the Act's passage, on January 10, 1979, the Corps' Director of Civil Works issued a letter entitled "Post-Authorization Studies for Authorized Replacement Project for Locks and Dam 26, Mississippi River" (Gov't Ex. 63, App., *infra*, 1a-7a). The letter noted that, prior to enactment of the authorizing legislation, studies were presented in 11 design memoranda and "in a series of environmental impact statements," and the studies had satisfied all "applicable pre-authorization planning requirements, including those in 33 C.F.R. Parts 290-295" (App., *infra*, 4a). Indeed, the Director concluded that because of "special circumstances" in this case, "previous studies have also satisfied most post-authorization procedures of" applicable Corps regulations (App., *infra*, 5a).[6] He concluded also

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[5] Title II, known as the Inland Waterways Revenue Act of 1978, amended the Internal Revenue Code, 26 U.S.C. (Supp. III) 4041-4042, and directed that user-tax revenues go into a new Inland Waterway Trust Fund to finance possible improvements of existing waterway facilities. See 33 U.S.C. (Supp. II) 1802.

[6] One special circumstance was that the Corps, in 1974 and before, had assumed that it already possessed congressional authorization to build the replacement (see note 2, *supra*). Consequently, many documents and studies, normally prepared after enactment of authorizing legislation, were already in existence before Pub. L. No. 95-502 was passed in 1978.

that "re-evaluation" by the Corps "of the basic planning decision and supporting pre-authorization studies is unnecessary for this project" because "no major changes have occurred" since such studies were completed (App., *infra*, 5a). Finally, because "no significant changes" had occurred in the "economic aspects of the project," discussed in previous studies, "no updating is needed" (App., *infra*, 5a-6a).[7] Accordingly, he instructed the St. Louis district engineer to carry out usual preconstruction procedures.

3. Petitioners filed a 12-count amended complaint in this case in December 1978. All respondents filed a joint answer and, later, a series of motions for summary judgment, for dismissal, and for an order narrowing issues to be tried. In September 1979, the district court dismissed seven of the amended complaint's 12 counts (Pet. App. G1-G2).[8]

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[7] The Director did call for an update of the cost-benefit ratio to reflect current prices, which was done (App., *infra*, 7a).

[8] The dismissed counts were based largely on petitioners' objections to the adequacy of the Corps' economic data supporting the project's cost-benefit ratio. The complaint alleged such deficiencies violated substantive standards in Corps' regulations (33 C.F.R. Parts 290-295) that govern whether and how the Corps decides to plan and propose water-resource projects for development.

These regulations are based in part on the "Principles and Standards for Planning Water and Related Land Resources," or "P&S," adopted by the Water Resources Council, 38 Fed. Reg. 24778-24869 (1973). Adoption of the P&S, in turn, is directed by Section 103 of the Water Resources Planning Act, 42 U.S.C. 1962a-2, as supplemented by Section 7(a) of the Department of Transportation Act of 1966, 49 U.S.C. 1656(a). Portions of the Corps' regulations (33 C.F.R. Part 294) are also based on a third statute, Section 122 of the River and Harbor Act of 1970, Pub. L. No. 91-611, 84

The remaining five counts were based on alleged violations by the Corps of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, arising from the Corps' decision to proceed with the project Congress had already authorized.[9] On these issues, the district court ruled prior to trial that, under NEPA, it could review two basic questions, namely: (1) Whether the various Corps documents comprising the environmental impact statement gave inadequate consideration to possible impacts caused by the project and thus violated Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C); and (2) whether these same documents, coupled with the Corps' decision to proceed with construction, failed to strike a reasonable balance between economic benefits and environmental costs so as to violate the sub-

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Stat. 1823. Section 122 directs the Corps to adopt "guidelines" to assure full consideration of "possible adverse economic, social and environmental effects" of any Corps project proposed after 1970.

Both the district court (Pet. Apps. E9-E10, G4-G8) and court of appeals (Pet. App. C16-C17, C19-C25) ruled that federal courts lack jurisdiction to review the adequacy or accuracy of the Corps' cost-benefit analysis for purposes of determining its compliance with the Water Resources Planning Act, the Department of Transportation Act of 1966, or the River and Harbor Act of 1970. Both courts held that these three Acts were solely intended to provide information to Congress when it considers whether to authorize Corps projects; once Congress authorizes and funds a given project, there is no reviewing role left, under these Acts, for federal courts.

[9] Also included in the five counts surviving pretrial dismissal was Count XII which alleged that the Corps' decision to proceed with project construction constituted arbitrary, capricious, and illegal agency action, actionable under 5 U.S.C. 706(2)(A) of the Administrative Procedure Act (APA).

stantive environmental goals described in Section 101(b) of NEPA, 42 U.S.C. 4331(b) (Pet. Apps. E9-E10, G2-G4, G8-G9).

Petitioners' evidence at the five-day trial comprised the testimony of two economists, two biologists, an engineer, and a railroad president, plus deposition excerpts and "hundreds of documentary exhibits" (Pet. App. C17). In this Court, petitioners make no claim that the district court erroneously excluded any evidence offered by them or erroneously abridged their cross-examination of the four government trial witnesses.

Following trial, the district court found that the environmental impact statement was adequate in all respects (Pet. App. E26-E35) and therefore was in full compliance with Section 102(2)(C) of NEPA (Pet. App. E39-E40, Concl. 4-7). The court of appeals agreed (Pet. App. C52-C64). In this Court, petitioners have expressly stated that they do not challenge the adequacy of the environmental impact statement (Pet. 5 n.6).

The district court concluded also that the Corps did not violate Section 101(b) of NEPA, 42 U.S.C. 4331(b). In so holding, the court rejected petitioners' claims that violations arose from the Corps' decision to build the project Congress had authorized 11 months ~~earlier~~ prior to trial before it concluded that estimated benefits from the project would exceed costs and from the Corps' treatment of comparative economic data for rail and barge traffic (Pet. App. E35-E38, E40).[10] The court of appeals affirmed these rulings (Pet. App. C64-C69).

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[10] The district court's conclusions of law, numbered 7 to 9, state (Pet. App. E40, Concl. 7-9):

> 7. The defendants adequately studied barge traffic on the Illinois River as well as revenue loss to rail carriers;

The district court noted that during trial, petitioners "have neither suggested, *nor proven* * * * the occurrence of any material change [related to the project] in the eleven months since authorization by Congress" (Pet. App. E10; emphasis in original). It then found as a fact that four supposed omissions from the Corps' cost-benefit analysis were actually "fully developed at the time Congress approved the cost/benefit analysis and further, that no new facts relating to [petitioners'] * * * claims have occurred in the months following authorization" (Pet. App. E38-E39).[11]

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its treatment of this information is neither arbitrary, nor capricious, nor in violation of section 102(2)(C) or 101(b) of NEPA.

8. The defendants' failure to weigh system-wide maintenance costs in balancing costs against benefits was neither arbitrary, capricious, nor in violation of section 101(b) of NEPA.

9. The defendants' conclusion that benefits exceed costs for Lock and Dam 26 is neither arbitrary, nor capricious, nor in violation of section 101(b) of NEPA.

[11] The district court repeated the same finding elsewhere in its opinion as follows (Pet. App. E10):

> The Court finds, as a matter of fact, that there have been no material changes in circumstances since Congress acted * * *.

The court of appeals later stated: "Like the District Court [Pet. App. E10, E38-E39] * * *, we do not believe that any material changes affecting the economic or environmental soundness of the replacement facility occurred after passage of" the authorizing legislation (Pet. App. C32).

In this respect, the courts' findings agreed with the earlier determination by the Corps' Director of Civil Works that "no significant changes" had occurred in the economic or environmental aspects of the project and no updating was needed (App., *infra*, 5a-6a; pages 6-7, *supra*). The petition to this Court does not challenge the finding of "no significant change."

Finally, the district court found that the data in the Corps' administrative record[12] was sufficiently complete to enable the court to review and decide whether the environmental impact statement and related economic analyses complied with NEPA (Pet. App. E25-E26). Accordingly, the court rejected petitioners' claim that they lacked access to certain raw data underlying the Corps' cost benefit analysis and were therefore unable to evaluate or comment upon it. To put the issue in context, it should be understood that the claimed deficiencies in information pertained to the Corps' rate-saving study. As the court of appeals explained, "[r]ate savings were determined by comparing the actual cost of shipping by barge with the rate on an alternative mode [of transportation, such as rail, truck, or pipeline]. The difference between the two was used to calculate the amount shippers would save if the capacity of Locks and Dam 26 was expanded" (Pet. App. C48), thus enabling more shipments to move by barge instead of by other modes. As part of this study, the Corps commissioned a private consultant to obtain updated barge rates on 231 commodity movements, passing through Locks and Dam 26 in 1972, between various origins and destinations. The Corps reported,[13] and

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[12] Government Exhibits 33-60, 62, 64-100, were designated as comprising the administrative record in support of the Corps' 1976 recommendation to Congress to authorize legislation. Government Exhibit 61, which is the 1979 Supplement No. 2 to the Corps' Design Memorandum No. 2 entitled "General Design Memorandum" (GDM Supp. 2), and Government Exhibit 63, which is the appendix hereto (App., *infra*, 1a-7a), were identified as part of the administrative record in support of the Corps' decision to seek funding for the ~~state~~ start of project construction.

[13] 1975 FER vol. III, apps. I-J (Gov't Ex. 43).

the district court found, that petitioners were aware of, "the tonnage, the commodity, its origin, destination and average rate" (Pet. App. E25; see also Pet. App. C48). In addition, the Corps' consultant conducted confidential interviews with barge carriers to obtain an updated barge rate based on unpublished long-term shipping contracts. The district court found that "the identity of an individual carrier" interviewed and "the rate of a particular movement" were the "only * * * data" that were "not disclosed" (Pet. App. E25-E26).[14] Petitioners claimed that they needed the names of barge carriers in order to cross-examine them and test the credibility of the quoted rates (Pet. App. C50). The district court disagreed, ruling that such names were privileged proprietory information which the Corps' consultant need not divulge (Pet. App. E26).[15] Later, the court of appeals concluded that withholding this privileged information impaired none of petitioners' rights (Pet. App. C49)—the railroad petitioners could and did conduct their own barge-rate studies, and the data reported by the Corps' consultant were independently verified in two subsequent studies done by the Tennessee Valley Authority and the Corps' St. Louis District (Pet. App. C50). Neither court regarded the anonymity of the interviewed barge carriers as a meaningful gap in the administrative record.

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[14] The court of appeals observed that petitioners "have *admitted* that the *only* data they do not possess are the identities of the barge carriers" interviewed by the Corps' private consultant (Pet. App. C48; emphasis added).

[15] No names of barge carriers or shippers interviewed were released by the consultant even to the Corps let alone to the general public (J.A. 3011, 3054, 3056). "J.A." refers to the joint appendix filed in the court of appeals.

4. On appeal, petitioners expanded their previous contentions. They now claimed that the Corps failed "to disclose the data, methodology, and calculations it used in preparing its cost-benefit analysis" (Pet. App. C45). This was deemed "disingenuous" by the court of appeals (Pet. App. C47), for the "step-by-step description of the methodology" was in fact disclosed by the Corps in several public documents in the administrative record (*ibid.*).[16] Having made such disclosure, the Corps was not additionally required to "produce its arithmetic" or "reproduce on paper all of the calculations performed by [its] * * * computer" (Pet. App. C47 n.58). In fact, the Corps had made its computer programs available to petitioners before trial (*ibid.*).

Petitioners claimed that after Congress had passed authorizing legislation the regulations at 33 C.F.R. Parts 290-295 required the Corps to make "a *de novo* evaluation of the project, repeating all pre-authorization economic and environmental studies," including a newly recomputed cost-benefit ratio, before it could begin construction (Pet. App. C25). They further claimed that whenever the Corps' post-authorization analyses and decisions encountered factual objections from petitioners, then the petitioners were entitled to have these objections resolved either by a trial-type adjudicatory hearing before the agency or by a trial *de novo* in the courts (Pet. App. C29). Petitioners contended that the Due Process Clause of the Fifth Amendment and the APA, 5

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[16] FER vol. 1 at 7-1 to 7-12 (Gov't Ex. 43); SED vol. 1 at 7-1 to 7-20 (Gov't Ex. 59); 1979 GDM Supp. 2 at 20-1 to 20-20 (Gov't Ex. 61).

U.S.C. 556, required these procedures (Pet. App. C29).[17]

Holding these claims to be "without merit" (Pet. App. C29), the court of appeals ruled that neither the Constitution nor the APA entitled petitioners to an adjudicatory agency hearing, to a *de novo* court trial, or "even to [judicial] review under the 'substantial evidence' standard" (*ibid.*). The court characterized the Corps' post-authorization decision to build the project as "informal adjudication," which, under 5 U.S.C. 706(2) of the APA and this Court's decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), could not be set aside by the courts unless the Corps' action was "arbitrary and capricious" (Pet. App. C30-C32).[18] The court of appeals held that the Corps' post-authorization "conclusion that there had been no major change in circumstances warranting [project] reevaluation, and that the authorized project should be reaffirmed and implemented, was not arbitrary or capricious" (Pet. App. C32). Accordingly, the court held that no applicable Corps planning regulations in 33 C.F.R. Parts 290-295 obliged the Corps to revise its project economic data, to recompute the cost-benefit analysis,

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[17] In neither their amended complaint (J.A. 360) nor their posttrial memorandum (J.A. 750) filed in the district court, had petitioners requested that the Corps conduct an adjudicatory hearing.

[18] Petitioners' demands for identically expansive judicial review of its NEPA claims were likewise rejected (Pet. App. C50-C52). The court of appeals held, in accordance with the controlling law, that courts "should not substitute their judgment for that of the agency" and should defer to agency conclusions having a "substantial basis" in fact (Pet. App. C52).

or to undertake a complete reevaluation of the project (Pet. App. C26, C27 & nn.32-34, C28; see also 33 C.F.R. 290.12(c)-(d)).

ARGUMENT

The detailed opinion of the court of appeals is correct, does not conflict with any decision of this Court or any court of appeals, and does not warrant review by this Court. The court of appeals correctly rejected petitioners' contention that a federal agency must submit to trial-type adjudication whenever anyone disputes the economic or environmental wisdom of that agency's decision to construct a public works project previously authorized by Congress. Further, the court below rejected the corollary contention that such adjudication could be completed only upon rendition of detailed factual findings that addressed each objection as framed by the disputant. As we shall show, the protracted procedure which petitioners would impose is not the law under the APA, 5 U.S.C. 551 *et seq.*, and is directly contrary to this Court's precedents in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 408-409, 414-416 (1971); *Camp* v. *Pitts*, 411 U.S. 138, 141-143 (1973); and *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227-228 (1980). Finally, the contention that petitioners did not receive sufficient information underlying the Corps' determination—a claim the court of appeals dismissed as "disengenuous" and "without merit" (Pet. App. C47, C48)—surely does not warrant review by this Court.

I. IT IS SETTLED LAW THAT PETITIONERS' DISPUTES CONCERNING FACTS UNDERLYING INFORMAL AGENCY ACTION BY THE CORPS NEED NOT BE RESOLVED BY TRIAL AND SPECIAL FACT FINDING

A. By enacting Title I, Act of Oct. 21, 1978, Pub. L. No. 95-502, 92 Stat. 1693-1695, Congress authorized the Army Corps of Engineers to construct Lock and Dam 26 near Alton, Illinois, to replace an existing facility. This authorization was not a routine enactment. The economic and environmental merits of the replacement project were hotly debated on the floors of both houses of Congress [19] and House and Senate subcommittees held hearings in 1976 and 1977 totalling 10 days in which petitioners' representatives participated.[20] To aid its consideration, Congress, at

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[19] 124 Cong. Rec. H12695-H12702 (daily ed. Oct. 13, 1978) (House debate); 124 Cong. Rec. S18043-S18052 (daily ed. Oct. 10, 1978).

[20] *Locks and Dam 26: Hearings on S. 1825, S. 3425, and S. 3506 Before the Subcomm. on Water Resources of the Senate Comm. on Public Works*, 94th Cong., 2d Sess. (1976) (*"Senate Hearings 1976"*); *Proposed Waterway User Charges and Replacement of Locks and Dam 26: Hearings on S. 712, S. 790, and S. 923 Before the Subcomm. on Water Resources of the Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess. (1977) (*"Senate Hearings 1977"*); *Waterway User Charges: Hearing Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. (1977) (*"House Hearings 1977"*).

As the court of appeals observed (Pet. App. C14):

> The [petitioners] * * * participated in the hearings before Congress, raising essentially the same objections they made during the pre-authorization stage. The environmental groups argued that the traffic increase expected from the single-lock facility would have a sub-

a minimum, had the benefit of the Corps' 1976 final environmental impact statement, the other documents appended to it, and 11 design memoranda (Pet. App. C11), all of which analyzed construction, design, cost and environmental data. Added to this were at least seven additional Corps reports (Gov't Exs. 49-57) and at least 20 reports by contract consultants (Gov't Exs. 64-70, 72-74, 76-78, 80-85) and the Department of Transportation (Gov't Exs. 71, 79).[21]

Thereafter, the Corps' Director of Civil Works concluded that no major changes in economic, environmental, or other aspects of the project had occurred

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stantial adverse environmental impact. *See, e.g.*, H.R. Rep. No. 95-545, 95th Cong., 1st Sess. 12 (1977); Senate Hearings 1976 at 417-428; House Hearings 1977 at 341-362. Both the environmentalists and the railroads opposed construction of the replacement facility on the ground that it was part of a plan to expand capacity throughout the waterways system. *See, e.g.*, S. Rep. No. 95-215, 95th Cong., 1st Sess. 6 (1977). The railroads also emphasized the argument that the Corps had failed to give adequate attention to the rehabilitation alternative. *See, e.g.*, Senate Hearings 1977 at 270-292, 344-350. They presented a rehabilitation scheme that they claimed would be safer and less expensive than replacement. *See, e.g.*, H.R. Rep. No. 95-545, *supra*, at 14-15. All of the [petitioners] * * * argued that the Corps had not properly computed the project's economic cost-benefit ratio. *See, e.g.*, Senate Hearings 1976 at 849-909.

[21] All government trial exhibits were listed in the federal respondents' amended pretrial brief filed in the district court (J.A. 629-635). In this listing, the federal respondents identified those exhibits comprising the administrative record in support of its 1976 recommendations that the project be authorized and in support of the post-authorization decision to seek funding and proceed with construction (page 11 note 12, *supra*).

since authorization, or since completion of prior Corps studies, which would require major planning revisions or a complete project reevaluation under Corps regulations at 33 C.F.R. Parts 290-295 (pages 6-7, *supra*; App., *infra*, 5a-6a). The findings of both courts below confirmed the Director's assessment (see page 10 & note 11, *supra*; Pet. Apps. C32, E10, E38-E39)[22] and the court of appeals expressly held that it was not an arbitrary or capricious decision (Pet. App. C32).

B. Petitioners nonetheless claim that the bare existence of their objections to various facts underlying the Corps' decision to build the project should trigger a plenary adversary process. In petitioners' view, once these "disputed issues of fact" arise, they must be resolved by an adjudicatory hearing before an administrative agency (Pet. 7), with later judicial review apparently governed by the "substantial evidence" standard described in 5 U.S.C. 706(2)(E) (Pet. 16-17), or by a *de novo* trial in a federal court (Pet. 8, 16-17). Petitioners insist that, regardless of which tribunal acts as the trial forum, every "disputed issue of fact," as petitioners choose to frame them, must be determined by detailed "factual findings" (Pet. 11-12). Solely because the district court did not attempt to substitute its judgment for that of the Corps,[23] petitioners contend that the "clear

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[22] The petition fails to contest these findings or explain how they are clearly erroneous; petitioners are therefore bound by them. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); cf. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974).

[23] The petition gives no coherent listing of which "disputed issues of fact" the district court was supposedly required, but failed, to resolve. Scattered descriptions suggest three: (1) whether the estimated annual loss to railroads from expanded barge traffic caused by the project will be $10

statutory command of the APA" has been "ignored" (Pet. 12).

C. Petitioners' demands for a plenary trial and for special findings on every "issue of fact" they contest are, at bottom, based on fallacies. Their governing assumption is that the entire administrative universe can be divided into two parts: rulemaking and adjudication. Thus, petitioners contend that since the Corps' post-authorization decision to build the project "can hardly be called a 'rule,'" it must "by definition" be an "'adjudication,'" because "[u]nder the APA, all final agency actions" can only be one or the other (Pet. 7 n.9). This logic is false and has been rejected by the courts.

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million or $50 million (Pet. 6 & n.7); (2) whether the upstream environmental impact of barge traffic will be major or minor (*id.* at 6 & n.8); and (3) whether "low-cost maintenance work" on the existing locks and dam is a suitable alternative to constructing a replacement project (Pet. 11 n.13).

The court of appeals held that, to the extent these matters were judicially reviewable at all, they were sufficiently discussed in the environmental impact statement and its appendices and the agency action taken was not arbitrary or capricious. Petitioners fail to explain why these holdings are erroneous or require further review.

Both courts held that the Corps' refusal to treat rail revenue losses as a loss to the national economy was proper because such potential revenues would merely be transferred from rail to barge carriers (Pet. Apps. C67, E38). The Corps' conclusion that upstream environmental impacts were so "minor" as not to require further scientific studies was sufficiently explained in the environmental impact statement (Pet. App. C59-C64, E32-E34) which also identified areas of uncertainty (Pet. Apps. C64, E34). In this Court, petitioners apparently no longer challenge the adequacy of the environmental impact statement (Pet. 5 n.6), yet they insist that its factual contents be made subject to trial *de novo*.

As to petitioners' alternative proposal that low-cost maintenance and rehabilitation be done to the existing facility,

We agree that the Corps' decision is not a "rule" as defined in 5 U.S.C. 551(4), and that the process leading up to that decision is not "rulemaking," as defined in 5 U.S.C. 551(5). But it is emphatically not true that removing the Corps' action from the category of "rulemaking" automatically consigns it to the category of "adjudication," as defined in 5 U.S.C. 551(7). This Court has expressly stated that petitioners' analysis is not sound reasoning and that since passage of the APA knowledgeable authorities have recognized that " 'certain types of agency action are neither rule making nor adjudication.' " *ITT* v. *Electrical Workers*, 419 U.S. 428, 442 (1975). See also *Attorney General's Manual on the Administrative Procedure Act* 40-41 (1947). Where the agency's nonrulemaking decisional process does not result in "the formulation of an order" (5 U.S.C. 551(7))[24] which binds anyone, that decisional process is not an "adjudication" under the APA (419 U.S. at 444) and, indeed, is not governed by the requirements of the Act (*e.g.*, 5 U.S.C. 554, 555, 706(2)(E))

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the court of appeals ruled that the subject was exhaustively discussed and analyzed in the environmental impact statement (Pet. App. C52-C55) and before congressional committees (Pet. App. C25), and that the risks inherent in rehabilitation showed that the Corps' and Congress' preference for replacement was rationally based (Pet. App. C54-C55). Finally, such rehabilitation was held to violate Section 101(j) of Pub. L. No. 95-502, 92 Stat. 1695, which required the replacement lock and dam to "provide for possible future expansion," a mandate which could not be met by rehabilitating the existing locks and dam (Pet. Apps. C53, E27).

[24] "Order" is defined in 5 U.S.C. 551(6) as "the whole or a part of a final disposition [other than rulemaking], whether affirmative, negative, injunctive, or declaratory in form, of an agency * * *."

otherwise applicable to "adjudication" (419 U.S. at 447-448).

Obviously, the Corps' decision to construct Lock and Dam 26 was not an order binding on petitioners or anyone else (419 U.S. at 444).[25] The court below correctly placed the decision within a "residual category," left untreated and undefined by the APA, which the court chose to call "informal adjudication" (Pet. App. C30-C31 & n.37). Others have called it "informal action" (*e.g.*, K. Davis, *Administrative Law Treatise* §§ 1.4, 14.23 (2d ed. 1978).

Plainly, no matter how the Corps' action is labelled, no federal statute requires the Corps' decision here to be made "on the record after opportunity for an agency [adjudicatory] hearing" (see 5 U.S.C. 554(a), 556). Petitioners virtually concede as much (Pet. 9-10).

D. Given the unavailability of an agency adjudicatory hearing to resolve petitioners' factual claims,

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[25] The Corps' decision does not compel or forbid petitioners to do anything. Nor does it take or impair any property interest of petitioners. Thus, the suggestion (Pet. 9-10 & n.11, 21-22) that the Due Process Clause of the Fifth Amendment compels a complete trial and resolution of all disputed facts before the project can be built is groundless. At most, the only interest that might be affected by the Corps project is the ability of the railroad petitioners to keep the midwestern transportation market for themselves and away from barge carriers. Without more, one's interest in remaining free from lawful business competition is not constitutionally or judicially protected. See *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 478-482 (1938), citing *Railroad Co.* v. *Ellerman*, 105 U.S. 166, 173-174 (1882). And petitioners' "public policy" preferences on whether, how, and where the Mississippi navigation system should be developed afford no due process basis for an agency adjudicatory hearing or court trial. *Earth Resources Co.* v. *FERC*, 617 F.2d 775, 777-778 (D.C. Cir. 1980); cf. *Arnett* v. *Kennedy*, 416 U.S. 134, 154-158 (1974).

they next contend that these claims were "subject to trial de novo" by the district court as described in 5 U.S.C. 706(2)(F) (Pet. 9, 15-16). They can find no support for this view in the statute itself and rely instead (Pet. 9) on a statement by the Senate Judiciary Committee that Section 706(2)(F) "would require the reviewing court to determine the facts in any case of adjudication not subject to * * * [5 U.S.C. 556-557]" or to determine "facts in connection with * * * any other conceivable form of agency action," Senate Comm. on the Judiciary, *Administrative Procedure Act: Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 214 (1946).

The text of the statute contains no such "requirement." Rather, 5 U.S.C. 706(2)(F) provides that the reviewing court "shall" set aside agency action "unwarranted by the facts *to the extent that* the facts are subject to trial de novo by the reviewing court" (emphasis added). Thus *de novo* review is available only if a *de novo* trial is *otherwise* required by applicable law. This was the approach taken in the *Attorney General's Manual on the Administrative Procedure Act, supra.*[26] This same approach is also

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[26] The *Manual* (at 109) states:

> As to clause (6) [now paragraph (F) of 5 U.S.C. 706(2)], the legislative history has resulted in misunderstanding. As S. 7 was introduced in the Senate, clause (6) was followed by a provision that "The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing." When S. 7 was reported by the Senate Committee, the quoted provision was omitted. Notwithstanding, the subsequent legislative history contains repeated statements to the effect that clause (6) embodies the "established rule * * * [which requires a judicial] trial de novo to

confirmed by the result reached in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*.

In *Overton Park*, as here, an agency approved the commencement and funding of a construction project. As here, no relevant statute expressly required the agency to make "formal findings" as part of its decision (401 U.S. at 409, 417); see also *Camp* v. *Pitts*, 411 U.S. 138, 140 (1973); *National Coal Operators' Association* v. *Kleppe*, 423 U.S. 388-399 (1976). As here, no relevant statute required an adjudicatory hearing, described in 5 U.S.C. 554, 556, "to produce a record that is the basis for agency action" (401 U.S. at 415). Given these circumstances, this Court held that the agency decision was not subject to review by *de novo* trial; rather *de novo* review is available only where there are inadequate factfinding procedures in an adjudicatory proceeding or where issues that were not before the agency are raised in judicial proceedings to enforce nonadjudicatory agency action. *Ibid.*; *Camp* v. *Pitts*, *supra*, 411 U.S. at 141-142.

Indeed, *Overton Park* (401 U.S. at 414) stressed that substantial evidence review, described in 5 U.S.C. 706(2)(E), and *de novo* review, described in 5 U.S.C.

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establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing." Senate Comparative Print, June 1945, p. 20 (Sen. Doc. pp. 39-40); H.R. Rep. p. 45 (Sen. Doc. p. 279).

To the contrary, the language of clause (6), "to the extent that the facts are subject to trial de novo by the reviewing court," obviously refers only to those existing situations in which judicial review has consisted of a trial de novo. * * * In addition, there is no "established rule" requiring a judicial trial de novo wherever statutes fail to require an agency hearing.

706(2)(F), were triggered in "narrow, specifically limited situations" pertaining to agency rulemaking or agency adjudication. As we have shown, the Corps' decision is outside either category. Consequently, it is reviewable only under standards described in paragraphs (A) through (D) of 5 U.S.C. 706(2), which have general applicability to "all cases" (*Overton Park, supra*, 401 U.S. at 413). Under these standards of review, agency action can be set aside only if it is arbitrary, capricious, an abuse of discretion, or unlawful, or if it fails to meet certain statutory, procedural or constitutional requirements (*id.* at 413-414).

E. Review under the "arbitrary and capricious" standard, although calling for "substantial inquiry" into factors considered by the agency, does not enable a court "to substitute its judgment for that of the agency" (*Overton Park, supra*, 401 U.S. at 416). Thus, under the "arbitrary and capricious" standard, it is reversible error for the reviewing court to set aside an agency decision which has a "rational basis" (*FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-803 (1978); *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 33-37 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976)). And, as here, where an environmental impact statement was reviewed for compliance with Section 102(2)(C) of the NEPA, 42 U.S.C. 4332(2)(C), a reviewing court cannot "substitute its judgment for that of the agency as to the environmental consequences of its actions"; its "only role" is "to insure that the agency has taken a 'hard look' at environmental consequences" (*Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citations omitted)). This Court recently adhered to this standard in *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen, supra*, 444 U.S. at 227-228. In any

event, those challenging the adequacy of an agency's environmental conclusions have the burden of proof on all issues.[27] Additionally, it is reversible error for a reviewing court to sit as a "super-agency empowered to substitute * * * testimony presented to it *de novo* for the evidence received and considered by the agency" in formulating a sufficiently complete impact statement. *County of Suffolk* v. *Secretary of Interior*, 562 F.2d 1368, 1383 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978). "Evidence weighing must be left to the agency making the policy decision" (562 F.2d at 1383), provided only that that evidence was adequately considered and not ignored.[28] The courts below correctly applied this limited standard of review (Pet. App. C50-C53), with the court of appeals noting that reviewing courts should not "resolve conflicting scientific opinions" so long as the "agency's conclusions have a substantial basis in fact" (Pet. App. C52). Accord: *Life of the Land* v. *Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974).

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[27] *Monroe County Conservation Council, Inc.* v. *Adams*, 566 F.2d 419, 422 (2d Cir. 1977), cert. denied, 435 U.S. 1006 (1978); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1300 (8th Cir. 1976); *Sierra Club* v. *Morton (MAFLA)*, 510 F.2d 813, 818 (5th Cir. 1975).

[28] The court of appeals noted, and petitioners do not deny, that many of petitioners' objections to various features of the project were already incorporated into the impact statement or its appendices which also contained the Corps' responses (Pet. App. C12-C13, C54, C56). Essentially the same objections were made by petitioners at congressional committee hearings (Pet. App. C14).

II. THE COURTS BELOW FOUND AS A FACT THAT SUFFICIENT UNDERLYING DATA WERE DISCLOSED BY THE CORPS TO PETITIONERS

Petitioners persist in maintaining that "raw data, calculations and the methodology used by the Corps" to balance economic benefits against environmental costs "have never been disclosed" to them (Pet. 22). Both courts below found that all necessary information had been disclosed and that only the identities of barge carriers interviewed confidentially by the Corps consultant were withheld (pages 11-13, *supra*; Pet. Apps. C48, C49 n.63, E25-E26). The court of appeals further found that petitioners, through one of their trial witnesses, "admitted" that the names of barge carriers were the "only data" they lacked (Pet. App. C48 & n.62). The court of appeals cited specific portions of the administrative record disclosing a "step-by-step description of the methodology used" (Pet. App. C47; see page 13, *supra*). It also found that petitioners' economic expert used an adapted version of the Corps' computer program "to produce alternative forecasts of the impact" of the project, and that this trial testimony "revealed a thorough understanding of the Corps' methodology" (Pet. App. C47). Petitioners discuss none of these findings or show why they are "clearly erroneous." Their unexplained assertions do not demonstrate any "exceptional" circumstances which would justify this Court's further review of the disclosure findings of two lower courts. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).[29]

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[29] Petitioners, insisting that "secret" information nonetheless underlies the Corps' analyses of the project, claim a due process right to examine and rebut all of it (Pet. 22-23), citing *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 88 (1913), and *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301

Petitioners, in short, are seeking to have this Court, contrary to *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), grant certiorari "to review evidence and discuss specific facts." Such review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
CAROL E. DINKINS
Assistant Attorney General
JACQUES B. GELIN
DIRK D. SNEL
Attorneys

NOVEMBER 1981

U.S. 292 (1937). Both cases were effectively distinguished by the court below (Pet. App. C30 n.36) and by this Court in *United States* v. *Florida East Coast R.R.*, 410 U.S. 224, 244-245 (1973). The *Louisville & Nashville* case involved agency adjudication of a shippers' complaint to invalidate rates charged by a specified carrier. *Ohio Bell Telephone* involved an agency proceeding to compel a utility to refund rates previously charged customers. As noted previously, the Corps' decision to build the project does not compel the petitioners to do anything, does not impair a recognized property interest of [illegible] petitioner, and is not an "adjudication" under 5 U.S.C. 551(7) calling for formal hearing procedures under 5 U.S.C. 554, 556.

APPENDIX

[Government Trial Exhibit 63 [1]]

DEPARTMENT OF THE ARMY
Office of the Chief of Engineers
Washington, D.C. 20314

10 JAN 1979

SUBJECT: Post-Authorization Studies for Authorized Replacement Project for Locks and Dam 26, Mississippi River

Division Engineer, Lower Mississippi Valley

1. Inclosed is an analysis of the post-authorization study procedures for Locks and Dam 26. You should direct the St. Louis District Engineer to proceed with the further actions indicated as required in items c and d of paragraph 7, and paragraphs 8 and 9 of this analysis.

2. All planning required to delineate the work to be included in the planned initial construction contract is considered to be complete except as indicated in the inclosed analysis. Therefore, the St. Louis District Engineer should plan to proceed with advertisement for bids for this work as soon as the actions called for in paragraph 1 above are taken and funds are available.

3. It appears that the actions of the Congress and the President in authorizing the replacement project have rendered moot the question of advisability of

[1] This exhibit was reproduced at pages 2406-2409 of the joint appendix filed in the court of appeals.

attempting to rehabilitate the existing structures. Pending any decision to the contrary, no further studies of rehabilitation plans will be required. However, in view of the advanced state of the field work in the current program for testing possible rehabilitation measures, this testing program and reports of information obtained should be completed as soon as practicable and made available to the engineering profession.

FOR THE CHIEF OF ENGINEERS:

[signed] CHARLES I. MCGINNIS
Major General, USA
Director of Civil Works

1 Incl

ANALYSIS OF STATUS OF PLANNING FOR AUTHORIZED REPLACEMENT PROJECT AT LOCKS AND DAM 26, MISSISSIPPI RIVER

1. Post-Authorization studies, set forth in ER 1110-2-1150, are required for each authorized construction project to establish the most suitable overall plan for accomplishment of the authorized improvement and to establish the basic design of the project features. ER 1110-2-1150 normally requires the preparation of a general design memorandum in two phases, followed by feature design memoranda covering separate aspects of the work. The scope of post-authorization analysis is normally limited to issues concerned with implementation of the Congressional authorization. Pre-authorization studies are not repeated unless major changes in external conditions have occurred after authorization or unless the authorized project differs materially from the project as proposed to Congress.

2. The Phase I General Design Memorandum (GDM) is primarily a planning document in which formulation and evaluation of economic and environmental aspects, coordination, and preliminary cost allocation is presented in sufficient detail to reflect changes which have occurred since pre-authorization planning and to support the conclusions and recommendations relevant to implementation. Implementation options within the congressional authorization are identified and evaluated, and an optimal plan for implementation is determined. Except where changed conditions warrant (usually as a result of long delay after authorization), alternatives different from those in the authorized project document are not re-evaluated. Where significant time has elapsed or significant

changes have occurred since authorization, the Phase I GDM also serves an updating function. Where no major changes have occurred, the Phase I GDM is a reaffirmation of the authorization document conclusions with a brief supporting discussion.

3. The Phase II General Design Memorandum is a functional design document concerned primarily with the technical design of the project as defined in the Phase I GDM.

4. The two-phase General Design Memorandum reporting procedure was established by ER 1110-2-1150, dated 1 October 1971. By directive dated 15 November 1971, signed by the Chief of Engineers (copy attached), a single-phase design memorandum procedure was retained for those projects where a single-phase general design memorandum under earlier practice was well advanced or where conversion to the two-phase general design memorandum would cause serious delay in the project schedule or an excessive increase in preconstruction planning costs. A single-phase GDM (DM No. 2) for Locks and Dam 26 was prepared in accordance with this directive.

5. Studies for Locks and Dam 26 conducted to date, in conformance with the requirements of ER 1110-2-1150, have been presented in Design Memoranda Nos. 1 through 11 and in a series of environmental impact statements. These studies were conducted prior to enactment of P.L. 95-502. At the time work on the project was enjoined in 1974, the Corps had advertised for bids for the initial construction contract. All applicable pre-authorization planning requirements, including those in 33 C.F.R. Parts 290-295, have been satisfied by these studies. These, and other studies (including the Revised Draft Supple-

mental EIS and the Final Supplemental EIS) undertaken following the Court's 1974 decision (AT & SF, et al. v. Callaway, 382 F.Supp. 610 (D.D.C. 1974)), were reported in HD 94-584, and have established that the basic planning decisions satisfy pre-authorization study requirements.

6. In Public Law 95-502, Congress has accepted and confirmed the basic planning decision, following review of the pre-authorization studies referred to above. As no major changes have occurred since pre-authorization studies were completed, re-evaluation of the basic planning decision and supporting pre-authorization studies is unnecessary for this project.

7. Because of the special circumstances of this project, previous studies have also satisfied most post-authorization procedures of ER 1110-2-1150. In this case, the following actions should be taken regarding post-authorization studies:

a. Requirements: Provide a basis for any necessary updating of environmental impacts and effects of the proposed action and the environmenal statement.

Action: Environmental impacts are discussed in DM No. 2, Section XIII; Revised Draft Supplemental EIS (1976); and HD 94-584, Final EIS (p. 115) and BERH Report (p. 178). As no significant environmental changes have occurred, revision of the Final Environmental Impact Statement is not necessary at this time.

b. Requirements: Establish the current economic aspects of the project.

Action: Economic aspects of the project are discussed in DM No. 11, Section V, VIII; HD 94-584,

BERH Report, Sections VII and IX; and DM No. 2, Section V, VI, XX and Appendix A. As no significant changes have occurred, no updating is needed. The effects of user charges are part of the authorized additional studies and do not impact on the post-authorization study requirements for the single lock and dam.

c. Requirement: Provide a basis for cost sharing agreements, preparation of plans and specifications, acquisition of lands, and negotiation of relocation agreements.

Action: The construction of the proposed facility will require local participation only for cost sharing of recreation facilities. A basis for cost sharing agreements set forth in DM No. 2 will be affirmed and reported as a supplement. Plans and specifications for two separate construction contracts, which were prepared on the basis of feature design memoranda, are virtually complete. Requirements for real estate acquisition are set forth in DM No. 3. The St. Louis District Engineer will negotiate relocation agreements. Pertinent DM's will be used as the basis for his negotiations.

d. Requirement: Facilitate the orderly scheduling and programming of funds for detailed design and construction of the project.

Action: General schedules for design and construction are shown in Section XXI of DM No. 2. The estimated funding requirements are also shown. In accordance with ER 11-2-240, 1 November 1974, a detailed project schedule (PB-2a ENG Form 2201a), prepared to reflect changes in costs and the schedule of work for the single lock plan presented in HD 94-584 should be updated based upon the GDM supplement.

8. The GDM should be further supplemented to reflect:

a. Any changes required to adequately describe each principal element of the single lock plan, including the updating of costs and benefits to reflect current prices; and

b. Mitigation lands as authorized but not presently covered in the GDM.

9. In addition, the requirements of Section 404, Clean Water Act, must be satisfied before construction can be initiated.

10. Because of the short time since authorization and the fact that no significant changes in project formulation or environmental effects have occurred since pre-authorization studies, and recognizing that public hearings have previously been held, no further public hearings are necessary at this time.

Attachments
Cy Ltr 15 Nov 71

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Petitioner's Reply Brief

No. 81-360

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Petitioners,

v.

JOHN O. MARSH, JR., Secretary, Department of the Army, *et al.*,

Respondents.

THE IZAAK WALTON LEAGUE OF AMERICA, *et al.*,

Petitioners,

v.

JOHN O. MARSH, JR., Secretary, Department of the Army, *et al.*,

Respondents.

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

For The Izaak Walton League of America, et al.

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

For The Atchison, Topeka and Santa Fe Railway Company, et al.

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

JOSEPH D. FEENEY
Western Railroad Association
222 South Riverside Plaza
Chicago, Illinois 60606
(312) 648-7812

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REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I.

The APA Framework

The briefs of the federal and the barge industry respondents deliberately ignore the central focus of this Petition: What is the statutory framework created by the Administrative Procedure Act for the trial and resolution of disputed fact issues underlying federal agency action?

The congressionally mandated APA structure—repeatedly and explicitly described in the APA legislative history—is crystal clear. Whether the agency action is classified as "rulemaking" or "adjudication" the APA framework provides only two mechanisms for trying and determining disputed issues of fact:

1. Trial and determination of disputed issues of fact by the agency with the district court serving in an appellate function.

2. Trial and determination of disputed fact issues by the district court where there was no statutory requirement for an agency trial.[1]

In their briefs, both the government and the barge industry ignore the clear mandate of the APA and baldly suggest that there is no right to any trial and determination of disputed fact issues underlying agency actions at any time or in any forum.

But Congress knew how important the right of trial and determination of disputed fact issues was to those adversely affected by agency action, and repeatedly and explicitly addressed this question throughout the legislative history of the APA. Because this question is so important and because Congress answered it so clearly and repeatedly, petitioners set forth the significant congressional declarations on this question.

The first reference to this question is in the Senate Judiciary Committee Print of June 1945.[2] Speaking of the fact that no agency trial procedures were required under the APA where the Congress had not explicitly required the decision to be on the record after opportunity for agency hearing, the Senate Committee explained:

> There should be no disposition to compel administrative hearings where Congress has not already so pro-

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[1] *See*, Petition, pp. 7, 8.

[2] Contained in Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong. 2d Sess. (1946), p. 11 (hereinafter "Legis. Hist.").

vided because, as pointed out below in connection with judicial review, the established law permits a trial *de novo* of the facts in all cases of adjudications where statutes do not require an administrative hearing. Moreover, as to subjects triable *de novo* in the courts, although the administrative procedure may in some instances shift the burden of proof the parties have a right to ultimate full judicial process.[3]

Legis. Hist., p. 22.

In this same June 1945 Senate print, the Senate Judiciary Committee again emphasized the fact that there were two different opportunities for trial and determination of disputed fact issues underlying agency action:

The fifth category necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administrative record may be made. The sixth category expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review (see *Kessler* v. *Strecker*, 307 U. S. 22, 35 (1939)). It should be noted that the sixth category, in accordance with the established rule, would permit trial *de novo* to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing.

Legis. Hist., p. 39-40.

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[3] The Senate Judiciary Committee comment illustrates the basic right to trial and determination of disputed fact issues and the distinction between that right and such separate questions as timing of the trial (before or after agency decision-making) and burden of proof. For example, long before the APA it was clear that disputed fact issues underlying legislative action need not be judicially determined *prior* to the legislative decision. Moreover in a judicial trial of disputed fact issues after the legislative decision has been made, a presumption of fact in favor of the legislative factual claims exists which the person challenging the legislative decision must rebut. But the disputed facts must be tried and determined in court. *See, e.g., Borden Farms Products Co.* v. *Baldwin*, 293 U. S. 194, 209-210 (1934).

On November 19, 1945, the Senate Judiciary Committee issued Report No. 752 which again addressed the same question:

> It [the Bill] requires no agency hearings in connection with either regulations or adjudications unless statutes already do so in particular cases, thereby preserving rights of judicial trials de novo.
>
> Legis. Hist., p. 192.

Senate Report No. 752 goes on to say:

> The sixth category, respecting the establishment of facts upon trial de novo, would require the reviewing court to determine the facts in any case of adjudication *not subject* to sections 7 and 8. It would also require the judicial determination of facts in connection with rule making *or any other conceivable form of agency action* to the extent that the facts were relevant to any pertinent issues of law presented.
>
> Legis. Hist., p. 214 (emphasis added).

The House Judiciary Committee adopted the identical language of the Senate quoted immediately above and added:

> In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law *must be tried and determined* de novo by the reviewing court respecting either the validity or application of such rule or order—because *facts necessary to the determination of any relevant question of law must be determined of record somewhere* and, if Congress has not provided that an agency shall do so, then the record must be made in court.
>
> Legis. Hist., pp. 279-80 (emphasis added).

Congressman Walter, Chairman of the House Judiciary subcommittee responsible for the House's hearings and drafting on the APA, said:

> The requirements of section 5 are thus limited to cases in which statutes otherwise require a hearing because, where statutes do not require an agency hearing, *the parties affected are entitled to try out the pertinent facts in court* and hence there is no reason for prescribing informal administrative procedures beyond the requirements of section 6 which I will discuss presently. The right of trial de novo in judicial review in cases where agencies do not proceed upon a statutory hearing will also be discussed later in connection with section 10(e).
>
> Legis. Hist., p. 359 (emphasis added).

In discussing § 10(e) [5 U. S. C. § 706(2)(F)], Congressman Walter said:

> Where there is no statutory administrative hearing to which review is confined, the facts pertinent to any relevant question of law *must of course be tried and determined de novo by the reviewing court.*
>
> Legis. Hist., p. 370 (emphasis added).

The barge industry, represented by respondent AIMR, totally ignores this legislative history. The government gives it only passing reference, and then makes an out of context citation to page 109 of the 1947 Attorney General's Manual on the Administrative Procedure Act (Govt. brief, p. 22 n.26).

When one examines page 109 of the Attorney General's manual in context one discovers that the concern there was over double trials—i.e., trial and determination of disputed facts by the agency followed by retrial and redetermination of the same disputed fact issues by the Court. The Attorney General was

concerned about those cases where the agency did give a trial equivalent to §§ 556-557 procedures even though not required to do so by statute. The Attorney General felt that it made no sense to have a second trial on disputed fact issues before the district court. Petitioners agree; all we seek is one forum where we can have a single trial and determination of disputed fact issues underlying the Corps' decision.

Federal respondents' second defensive ploy is to say that the Corps decision to build Lock and Dam 26 was not an "adjudication" because it did not result in "the formulation of an order". But the government ignores the definition of an "order" as set forth in 5 U.S.C. § 551(6). Congress intended "order" to be a catch-all definition meaning any agency final disposition—other than rulemaking. Thus under the APA all final administrative actions are either rulemaking or adjudication; there is no other classification.[4]

Nor is the government aided by this Court's decision in *ITT* v. *Electrical Workers*, 419 U. S. 428 (1975). There this Court held that an NLRB § 10(k) proceeding was not a "final disposition" within the meaning of § 551(6) because all of the fact issues could be completely relitigated prior to any impact on the challenging party. Here there is no dispute that the Corps decision to "reaffirm", i.e., the decision to build, was a final disposition within the meaning of 5 U.S.C. § 551(6). The Court of Appeals held below that the Corps' decision was an "adjudication" (Pet. App., C-30).

Nor is the government's citation to pages 40-41 of the Attorney General's manual pertinent. There the Attorney General was distinguishing those government functions which fall into the catch-all definition of adjudication under § 551(6) and (7) but which do not require agency trial procedures under

[4] "The basic scheme underlying the legislation is to classify all administrative proceedings into these two categories." Letter of Attorney General Tom Clark to Congressman Sumner, Chairman of the House Judiciary Committee, October 19, 1945, Legis. Hist., p. 408.

§§ 556-557. The distinction he relied upon was the fact that §§ 556-557 procedures only applied to "adjudication required by statute to be determined on the record after opportunity for agency hearing". The Attorney General did not address the question presented here, i.e., the APA requirement for trial of disputed facts in the district court where there was no agency trial.

Respondents' final tactic is to repeatedly cite the *Overton Park* and *Camp* v. *Pitts* decisions.[5] As stated in our petition, we could awkwardly try to distinguish these decisions. It is true that this Court has never examined the APA framework for trial and determination of disputed fact issues—especially in light of the clear and repeated legislative mandate quoted above. But it is also true that *Overton Park* and *Camp* v. *Pitts*, where read and applied as respondents suggest, are directly contrary to the legislative framework created by the APA for trial of disputed fact issues. These decisions have been used to bar any trial and determination anywhere of disputed issues of fact underlying agency action.

Apart from the rejection of the clear APA mandate for trial and determination of disputed fact issues, the tragic irony is that *Overton Park* and *Camp* v. *Pitts* have been the principal stimulus for lower courts to do exactly what this Court forbade in *Vermont Yankee*.[6] With *Overton Park* and *Camp* v. *Pitts* construed as precluding any judicial trial of disputed facts (contrary to the APA framework) and with the APA not requiring agency trials on disputed fact issues (on the explicit understanding that such issues would be tried and determined in district court), lower courts have created *ad hoc* "common law" procedural requirements which have no basis in the APA.

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[5] *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402 (1971); *Camp* v. *Pitts*, 411 U. S. 138 (1973).

[6] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U. S. 519 (1978).

These *ad hoc* procedures are totally unpredictable and often wind up—as here—in an illogical and inconsistent mixing of the two APA mechanisms. If the agency gives a trial and determination of disputed fact issues, the Court has no need to take any evidence outside the agency trial record. Here the district court took such evidence. Conversely if the agency never provided a trial and determination of disputed fact issues (because it was not required to under the APA), the APA dictates that the district court must not only try the disputed fact issues (i.e., take evidence), but must also determine the disputed facts. Here the district court took evidence on disputed fact issues and then refused to determine those issues even though there had been no agency trial below.

As set forth in our Petition, many scholars have noted the inconsistency between the APA framework for trying disputed fact issues and the *Overton Park* and *Camp* v. *Pitts* decisions. Some of these same scholars, such as Professor Davis, have argued that this Court's mandate in *Vermont Yankee*—that lower courts adhere to the APA framework—is wrong and that because of *Overton Park*, the lower courts should continue in their practice of developing *ad hoc* procedures under the guise of "common law".

Petitioners simply ask this Court to give desperately needed direction to the lower courts, private litigants and the government to follow the clearcut mandate of the APA for trial and determination of disputed fact issues underlying agency action.

II.

The Disclosure Issue

As discussed in the Petition, a key factual claim made by the Corps in support of its decision to build Lock and Dam 26 was that economic benefits ($86,995,000) exceeded economic costs ($44,867,000). *See*, Petition, pp. 4-5. Of the $86,995,000 total benefits, $82,678,000 is purportedly based on a simple arithmetic calculation of shipper cost differentials between certain origins and destinations.

These arithmetic calculations are supposedly simple addition and multiplication of numbers to reach $82,678,000. These same simple calculations were supposedly used to route barge traffic between the Illinois and Upper Mississippi to reach conclusions as to environmental impact.

Respondents claim that petitioners were given these computations. Petitioners of course heatedly dispute the respondents' claim—made for the first time in a contested affidavit filed with the Court of Appeals.

But that is not the point. Regardless of claimed disclosure to petitioners, where are these arithmetic calculations now? Why didn't the Corps simply tender these calculations to the district and appellate courts?[7] The failure of the Corps to submit these calculations for judicial review is a question which is unaffected by Corps extra-record claims of disclosure to petitioners. Indeed, the absence of these calculations from the "record" emphasizes exactly the point raised by the Court in *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 303 (1937). Wholly apart from disclosure to litigants, the evidence and computations upon which the agency reaches its numerical claims must be in the material available for judicial review. Otherwise the judicial review function becomes a meaningless charade.

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[7] These arithmetic computations are contained in at most a few hundred pages. As a subterfuge the Corps has filed a "record" containing tens of thousands of pieces of mostly irrelevant paper without including these computations.

Yet nowhere in the "record" before the lower courts can petitioners or the reviewing courts locate these simple computations. Without these arithmetic computations neither this Court nor the lower courts can evaluate the validity of the $82,678,000 benefit claim and claims as to the environmental impacts. One cannot add and multiply the numerical values in the "record" materials cited by respondents and reach $82,678,000—it's that simple.

CONCLUSION

For all the reasons set forth in the Petition, as expanded upon herein, petitioners respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

Counsel For Petitioners
The Izaak Walton League of America, et al.

JOSEPH V. KARAGANIS
SANFORD R. GAIL
A. BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

JOSEPH D. FEENEY
Western Railroad Association
222 South Riverside Plaza
Chicago, Illinois 60606
(312) 648-7812

Counsel For Petitioners
The Atchison, Topeka and Santa Fe Railway Company, et al.